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# RECOVERED MEMORIES OF CHILDHOOD ABUSE: SHOULD LONG-BURIED MEMORIES BE ADMISSIBLE TESTIMONY?

## I. INTRODUCTION

On November 30, 1990, George Franklin, Jr. was convicted of first-degree murder and sentenced to life in prison.<sup>1</sup> The 1969 murder of eight-year-old Susan Nason had gone unsolved until Franklin's daughter, Eileen Franklin Lipsker ("Eileen"), reported what she called a recovered memory of witnessing her father murder her best friend Susan.<sup>2</sup> Eileen, then age twenty-nine, testified that she was watching her five-year-old daughter, who bore a striking resemblance to Susan Nason, when suddenly an image of Susan looking at her while Franklin raised a rock over Susan's head flashed through Eileen's mind.<sup>3</sup> Ten months after she recovered this memory, Eileen contacted the police.<sup>4</sup>

When George Franklin's case came to trial, Eileen's recovered memory provided the only evidence linking him to the murder of Susan Nason.<sup>5</sup> Eileen testified extensively about what she remembered and how she had come to remember it.<sup>6</sup> The prosecution called Dr. Lenore Terr ("Terr"), a psychiatry professor and clinician from San Francisco and a specialist in childhood trauma, as an expert witness to support Eileen's testimony.<sup>7</sup> Terr testified to the phenomenon of re-

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<sup>1</sup> Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCHOL. 518, 518 (1993).

<sup>2</sup> Victor Barall, *Thanks for the Memories: Criminal Law and the Psychology of Memory*, 59 BROOK. L. REV. 1473, 1477 (1994) (reviewing HARRY N. MACLEAN, *ONCE UPON A TIME: A TRUE STORY OF MEMORY, MURDER, AND THE LAW* (1993)).

<sup>3</sup> ELIZABETH F. LOFTUS & KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY* 40, 70 (1994).

<sup>4</sup> See Loftus, *supra* note 1, at 518-19. Eileen's memory underwent several important transformations between the time she first told her story to police and the trial. Barall, *supra* note 2, at 1489-90. For example, she initially said that her father had picked up Susan in his van in the morning before school and taken her and Eileen to the spot where Susan was killed. *Id.* In fact, Susan was last seen after school. *Id.* Eileen subsequently told police that as she searched her memory, she realized that the angle of the sun in that scene made it impossible for the murder to have happened in the morning, so her father must have picked up Susan *after* school. LOFTUS & KETCHAM, *supra* note 3, at 46.

<sup>5</sup> Loftus, *supra* note 1, at 579.

<sup>6</sup> Barall, *supra* note 2, at 1487-88.

<sup>7</sup> *Id.* at 1490.

pressed and recovered memory.<sup>8</sup> She told the jury that whole memories can be preserved intact for a prolonged period of time and later recovered, often triggered by a visual cue such as Eileen's glimpse of her daughter's face in a particular expression that reminded her of Susan's expression just before she was killed.<sup>9</sup> The defense called Dr. David Spiegel ("Spiegel"), a psychiatry professor with credentials as impressive as Terr's, to challenge Terr's theory of repression and recovery.<sup>10</sup> Spiegel described to the jury the difficulty in distinguishing between a false memory and a true one and testified that as memories age they are increasingly likely to mix fact and fantasy.<sup>11</sup> He further testified that many of the aspects of Eileen's childhood, including possible abuse by her father, could explain why her unconscious mind might create an image of her father killing her friend.<sup>12</sup> No physical evidence remained connecting Franklin to the murder, and no additional witnesses testified to seeing him anywhere near Susan Nason or the murder site that day.<sup>13</sup> The jury had little more than Eileen's testimony and the testimony of the expert witnesses as evidence of Franklin's guilt.<sup>14</sup> When the trial was completed, it took the jury only a day to return a first-degree murder conviction.<sup>15</sup>

In 1993, a Massachusetts jury awarded a \$500,000 verdict against a civil defendant for sexual abuse inflicted on his daughter, Jennifer Hoult.<sup>16</sup> Jennifer alleged that her father had raped her approximately 3000 times when she was between the ages of four and sixteen.<sup>17</sup> She had no recollection of these events, she said, until she entered therapy in October 1985.<sup>18</sup> Her mother, who was divorced from her father, testified that she had never witnessed any of these alleged incidents,

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<sup>8</sup> See *id.* at 1490-91.

<sup>9</sup> *Id.* at 1491.

<sup>10</sup> Barall, *supra* note 2, at 1492.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See Loftus, *supra* note 1, at 519.

<sup>14</sup> See *id.*

<sup>15</sup> *Id.* at 518. A federal district court judge recently overturned Franklin's conviction and ordered a new trial. *Franklin v. Duncan*, No. C-94-1430 DLJ (N.D. Cal. 1995). The issue of the validity of Eileen's recovered memory was not at issue in the appeal. *Id.* The court rested its decision on two issues that, it held, resulted in a fundamentally unfair trial: an instruction to the jury that they could consider Franklin's silence when asked by his daughter if he committed the crime, and the trial judge's refusal to allow into evidence newspaper articles from the period following Susan Nason's death that would have shown how Eileen could have known the details that she reported without having witnessed the murder. *Id.*

<sup>16</sup> Matthew Brelis, *Man Must Pay \$500,000 for Raping His Daughter*, BOSTON GLOBE, July 2, 1993, at 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

but she had seen Jennifer's father grab a baby-sitter's breast once.<sup>19</sup> Jennifer's three siblings have no memory of any abuse, either of themselves or of their sister.<sup>20</sup> In addition to Jennifer's and her mother's testimony, an expert witness testified that she had evaluated Jennifer and that her symptoms were consistent with her allegations.<sup>21</sup> It took the jury only four hours to return a verdict for Jennifer Hoult.<sup>22</sup>

In 1991, an Iowa man, baffled by his daughter's accusations of sexual abuse, hired a female private investigator to find out what his daughter had been exposed to during therapy.<sup>23</sup> The investigator, Sharon, made an appointment with the daughter's therapist, Kate.<sup>24</sup> Sharon reported sleep disturbances, depression, some minor problems with alcohol and a tense relationship with her mother and stepfather.<sup>25</sup> Kate told her that her sleep disturbances were a form of body memory that often reflected a memory of "a particularly dreadful period of time" in a person's life.<sup>26</sup> Sharon asked how one might find out if something bad had happened, to which the therapist responded, "The hyper-startle response itself is a suggestion that something did happen," and suggested that, once Sharon trusted her, she allow the therapist to take her back in time.<sup>27</sup>

At another session, Sharon appeared upset and reported having had a terrible week, with nightmares, waking up with pain and waking up feeling that someone was in the room.<sup>28</sup> At this point the therapist told Sharon that she was almost certainly experiencing body memory from a trauma earlier in life that she could not remember because her brain had blocked the memory.<sup>29</sup> Kate then began to read from a self-help book a list of forty symptoms associated with sexual abuse.<sup>30</sup> As she read two-thirds of the symptoms, she looked at Sharon and

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<sup>19</sup> *Id.* at 1, 13.

<sup>20</sup> *See id.* at 13.

<sup>21</sup> Brellis, *supra* note 16, at 13. The verdict was upheld by the United States Court of Appeals for the First Circuit in May 1995. *Hoult v. Hoult*, 57 F.3d 1, 5 (1st Cir. 1995).

<sup>22</sup> *Id.*

<sup>23</sup> LOFTUS & KETCHAM, *supra* note 3, at 176-77.

<sup>24</sup> *Id.* at 191-92.

<sup>25</sup> *Id.* at 191.

<sup>26</sup> *Id.* at 192-93.

<sup>27</sup> *Id.* at 193.

<sup>28</sup> LOFTUS & KETCHAM, *supra* note 3, at 194. The second session was largely uneventful. *Id.* Kate focused on Sharon's drinking and recommended weekly Alcoholics Anonymous meetings. *Id.*

<sup>29</sup> *Id.* She also told Sharon that she wanted to lend her the book *The Courage to Heal*, a self-help book that is touted as the bible of the incest-recovery movement. *Id.* at 195.

<sup>30</sup> *Id.* at 195.

noded her head in confirmation.<sup>31</sup> She recommended three incest survivor meetings for Sharon to attend before the next session.<sup>32</sup>

At the fourth and final session, Sharon again questioned the diagnosis, saying she had no memory of any abuse.<sup>33</sup> The therapist told her that it appeared that Sharon had experienced some trauma and that most of the time people with her symptoms had experienced some kind of abuse.<sup>34</sup> She qualified this by saying, "It's not for me to say I know," but continued, "It appears that something is coming to the surface."<sup>35</sup> They proceeded to discuss the process of recovering memory, and the therapist told Sharon that memories might come back in little pieces, all at once, or might never come back as visual memories.<sup>36</sup> She told Sharon, "You can't shut the memories out. They need to come."<sup>37</sup>

These stories represent some of the essential ingredients of the recovered memory debate and some of the implications of this controversy for the legal profession.<sup>38</sup> The experience of the investigator reflects the concern of some professionals that recovered memories are distorted and perhaps even created by highly suggestive therapeutic techniques.<sup>39</sup> The verdict in favor of Jennifer Hoult raises a concern for many that a memory recovered in therapy can become powerful enough, to the person who recovers the memory and to those who hear her story, to eclipse a complete lack of corroborating evidence.<sup>40</sup> Finally, the outcome of the Franklin case, to the extent that it turned on expert testimony, and the jury's belief in Eileen's memory, represents to some the dangers and uncertainties involved in bringing a recovered memory into a courtroom.<sup>41</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> LOFTUS & KETCHAM, *supra* note 3, at 195.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 196.

<sup>36</sup> *Id.* at 196-97.

<sup>37</sup> *Id.* at 197.

<sup>38</sup> See LOFTUS & KETCHAM, *supra* note 3, at 177; Barall, *supra* note 2, at 1486; Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Telling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. LAW 129, 158, 162-63 (1993).

<sup>39</sup> See LOFTUS & KETCHAM, *supra* note 3, at 177; Ernsdorff & Loftus, *supra* note 38, at 158-60. The investigator visited the therapist at the request of an accused parent, which may lead some to question whether her report is an independent, objective representation of what occurs in therapy. See LOFTUS & KETCHAM, *supra* note 3, at 177-78. Nonetheless, most of the sessions were taped, and the tapes and her notes are an interesting glimpse into how a therapist might suggest a memory of sexual abuse on the basis of some very general symptoms, even if one is skeptical of the report. See *id.*

<sup>40</sup> See Ernsdorff & Loftus, *supra* note 38, at 162-63.

<sup>41</sup> See Barall, *supra* note 2, at 1486.

In the past, a person who recovered a memory of childhood sexual abuse after many years would have no legal recourse because both civil and criminal statutes of limitations would have expired long before the recovery of the memory.<sup>42</sup> In recent years, however, this has changed.<sup>43</sup> Many states have recognized both the equitable problem of barring plaintiffs from suit when they had no memory for many years of the act that gave rise to the suit and the simple injustice of allowing perpetrators of child abuse to go unpunished.<sup>44</sup> Most states that have addressed this issue have applied the discovery rule to their statutes of limitations, either through case law or through legislative action, allowing the statutes to toll not when the act occurred but when the plaintiff discovered the act and the resulting harm.<sup>45</sup> As a result, an increasing number of cases involving recovered memories of sexual abuse are presenting courts with new and difficult evidentiary issues.<sup>46</sup>

One particularly vexing issue that has not been resolved, and as yet has been largely unaddressed, is the question of a witness's competence to testify to long-buried, recently recovered memories.<sup>47</sup> The potential dangers of such testimony are analogous to the dangers of hypnotically refreshed testimony that have been addressed by most courts.<sup>48</sup> Courts have recognized three primary dangers associated with hypnosis: the danger of suggestibility; the possibility that the subject will "confabulate," or fill in the gaps of his or her story, in order to present a more coherent picture of an event; and the danger that the

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<sup>42</sup> See Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1200-03 (1992) (describing the difficulties raised by short statutes of limitations for abuse survivors and the recent changes in those laws).

<sup>43</sup> *Id.* at 1200.

<sup>44</sup> See, e.g., *Tyson v. Tyson*, 727 P.2d 226, 234-35 (Wash. 1986) (Pearson, J., dissenting) (the *Tyson* decision, in which the majority declined to extend the statute of limitations, was overturned by a subsequent state statute extending the limitations period); *Mary D. v. John D.*, 264 Cal. Rptr. 633, 638-39 (Ct. App. 1989) (balancing "the plaintiff's right to seek redress for an outrageous violation against her which she has . . . repressed until recently, through no fault of her own and as a direct result of the . . . abuse" against the right of a defendant to be free from stale claims, and applying the delayed discovery rule to cases of repressed memory).

<sup>45</sup> See, e.g., *Johnson v. Johnson*, 701 F. Supp. 1363, 1370 (N.D. Ill. 1988) (applying Illinois law and holding that the statute of limitations should be tolled for plaintiffs who repressed memories of sexual abuse); *Mary D.*, 264 Cal. Rptr. at 639 (applying discovery rule to plaintiff who can show that memory of abuse was repressed).

<sup>46</sup> See Ernsdorff & Loftus, *supra* note 38, at 162; Walter Reich, *The Monster in the Mists*, N.Y. TIMES BOOK REVIEW, at 1, 33 (reviewing LAWRENCE WRIGHT, REMEMBERING SATAN (1994), MICHAEL YAPKO, SUGGESTIONS OF ABUSE: TRUE AND FALSE MEMORIES OF CHILDHOOD SEXUAL TRAUMA (1994), and LENORE TERR, UNCHAINED MEMORIES: TRUE STORIES OF TRAUMATIC MEMORIES, LOST AND FOUND (1994)); *When Memories Collide: Therapists Draw Fire from Those Who Say They Mix Fact and Fantasy*, NEWSDAY, Dec. 13, 1994, at B33.

<sup>47</sup> See Ernsdorff & Loftus, *supra* note 38, at 166.

<sup>48</sup> See *id.* at 162; Barall, *supra* note 2, at 1486 n.47.

subject will experience an increased, often unjustified, confidence in the truth of his or her story.<sup>49</sup> This "memory hardening" has been cited as an important consideration because it renders effective cross-examination difficult if not impossible.<sup>50</sup>

Similar dangers might be attributed to the process of recovering a long-buried memory of sexual abuse through therapy.<sup>51</sup> The therapeutic process that evokes these memories poses a danger of suggestibility.<sup>52</sup> Further, a perceived message from the therapist that sexual abuse is an acceptable, even encouraged, explanation for the patient's problems, may raise a danger of confabulation by the patient similar to that found in hypnosis.<sup>53</sup> Finally, the circumstances surrounding the memory recovery may raise a danger that a patient, after prolonged therapy and effective isolation from family members who might challenge her story, will experience an increased confidence in the memory, even if the memory is not true.<sup>54</sup>

Thus far, the competence of witnesses to testify to recently recovered memories has not been directly challenged, except to the extent that those memories were recovered through hypnosis.<sup>55</sup> If confronted with such a challenge, courts may find guidance in the treatment of hypnotically refreshed testimony over the past decade.<sup>56</sup> Part II of this Note will examine the controversy over repressed memory and some of the problems presented by the testimony of recovered memory

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<sup>49</sup> See, e.g., *Contreras v. State*, 718 P.2d 129, 131-32 (Alaska 1986); *State v. Mack*, 292 N.W.2d 764, 768-69 (Minn. 1980); *State v. Hurd*, 432 A.2d 86, 93 (N.J. 1981).

<sup>50</sup> See *Contreras*, 718 P.2d at 133; *Mack*, 292 N.W.2d at 769; *Hurd*, 432 A.2d at 93-94.

<sup>51</sup> See Ernsdorff & Loftus, *supra* note 38, at 162.

<sup>52</sup> See *id.* at 158.

<sup>53</sup> See *id.* at 159-60.

<sup>54</sup> *Id.* at 162-63; see *Frontline: Divided Memories* (PBS television broadcast, Apr. 11, 1995) (discussing treatment center that advocates "detachment" of clients from families of origin as a necessary component of therapy).

<sup>55</sup> See, e.g., *Borawick v. Shay*, 842 F. Supp. 1501, 1505 (D. Conn. 1994), *aff'd*, 68 F.3d 597 (2d Cir. 1995) (holding that testimony refreshed by therapeutic hypnosis must be evaluated by looking at the hypnotist's qualifications, whether the hypnotist added new elements to the subject's description, the existence of a permanent record of the hypnosis and the existence of corroborating evidence); *McGlaufflin v. State*, 857 P.2d 366, 378 (Alaska Ct. App. 1993) (holding that testimony refreshed during therapeutic hypnosis is admissible if the circumstances of the hypnosis make it likely that the witness's memory has not been enhanced or altered by the hypnosis); *State v. Varela*, 817 P.2d 731, 732 (N.M. Ct. App. 1991) (holding that testimony refreshed by therapeutic hypnosis is admissible only if the trial court determines under all the circumstances that the use of hypnosis was reasonably likely to result in recall comparable to normal human memory); *West v. Howard*, 601 N.E.2d 528, 533 (Ohio Ct. App. 1991) (holding that a particular therapeutic hypnosis procedure did not meet the procedural safeguards used in Ohio to evaluate reliability and that the witness should not be allowed to testify); Jo Becker, "Recovered Memories" on Trial in N.H. Rape Cases, *PATRIOT LEDGER*, Dec. 24, 1994, at 17.

<sup>56</sup> See Barall, *supra* note 2, at 1486 n.47; Ernsdorff & Loftus, *supra* note 38, at 162, 165.

witnesses.<sup>57</sup> Part III will examine the recent treatment of hypnotically refreshed testimony and the reasoning behind the restrictions placed on such testimony.<sup>58</sup> Finally, Part IV will explore the extent to which recovered memory testimony resembles hypnotically refreshed testimony and the extent to which the restrictions imposed on previously hypnotized witnesses are applicable to recovered memory witnesses.<sup>59</sup>

## II. THE RECOVERED MEMORY CONTROVERSY

Those who claim to have recovered memories of childhood abuse may have accessed those memories in a number of different ways. Some, like Eileen Franklin, assert that the memories returned spontaneously, triggered by a perceptual cue.<sup>60</sup> Others report that their memories surfaced during therapy. The range of therapeutic environments in which these memories may surface is extensive. On one extreme, a therapist might play a relatively passive role, following the Freudian model of listening with "evenly hovering attention" as the patient free associates.<sup>61</sup> Eventually, a narrative of what the patient has experienced in his or her life emerges from this process of free association, which might include an uncovered memory of a childhood trauma.<sup>62</sup>

On the other extreme, some therapies involve aggressive attempts to unlock hidden memories.<sup>63</sup> Therapists who specialize in incest recovery and authors of self-help books suggest several specific techniques for memory retrieval.<sup>64</sup> Many therapists recommend asking the patients directly if they have been sexually abused, reasoning that the question will at least signal to the patients that they will be believed if they disclose abuse.<sup>65</sup> The second recommendation is the use of "symp-

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<sup>57</sup> See *infra* notes 60–242 and accompanying text.

<sup>58</sup> See *infra* notes 243–374 and accompanying text.

<sup>59</sup> See *infra* notes 375–473 and accompanying text. This Note will focus on memories recovered through the process of therapy and will not address the issues raised by memories recovered spontaneously, without any therapeutic intervention.

<sup>60</sup> See *supra* notes 2–4 and accompanying text. Eileen had actually originally told her brother that she recovered this memory under hypnosis, but later claimed to have said that only because she wanted him to believe her. MACLEAN, *supra* note 2, at 352.

<sup>61</sup> See DONALD P. SPENCE, NARRATIVE TRUTH AND HISTORICAL TRUTH; MEANING AND INTERPRETATION IN PSYCHOANALYSIS 24–25, 28–29 (1982) (describing Freud's model but suggesting that the analyst must in reality take a slightly more active posture in order to provide context for what the patient is saying).

<sup>62</sup> See *id.* at 28.

<sup>63</sup> LOFTUS & KETCHAM, *supra* note 3, at 141.

<sup>64</sup> *Id.* at 151–70.

<sup>65</sup> *Id.* at 151.



tom lists," reading through with the patient a list of behaviors and emotions that might indicate a history of sexual abuse.<sup>66</sup> Another technique relies on imagistic work, asking the patient to start with an image as a focal point and to describe every sight and sensation that he or she experiences in response to that image.<sup>67</sup> A similar technique is journal writing, in which patients are asked to perform the same exercise in writing.<sup>68</sup> Another related technique, art therapy, substitutes drawing for writing or verbal expression in reporting the thoughts or feelings evoked by a particular image.<sup>69</sup> In all three of these exercises, therapists may encourage their patients to free associate or to "tell a story" about what might have happened, as a way to further remove their conscious barriers against remembering.<sup>70</sup>

Some therapists also employ dream work, in which patients are asked to keep a record of symbols and images from their dreams that might be memory fragments.<sup>71</sup> Another technique, body work, involves attempts to access physical reactions to certain stimuli, through methods like massage therapy.<sup>72</sup> Therapists may also employ feelings work, which involves a patient working with either grief or rage, expressing the feeling nonverbally and allowing it to escalate until the patient achieves some form of release.<sup>73</sup> Some therapists believe that this release of pent-up emotions can help unblock a patient's memory.<sup>74</sup> In addition to whatever work is done individually between therapist and patient, many therapists encourage their patients to undergo group therapy with others who are in a similar situation.<sup>75</sup> Finally, some therapies that focus on the retrieval of long-buried memories involve the use of hypnosis.<sup>76</sup> Hypnosis has been used for many years in the medical community as a method of helping patients deal with pain, break addictions or address weight problems.<sup>77</sup> Many believe that hypnosis also can be a powerful tool for unlocking hidden memories.<sup>78</sup>

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<sup>66</sup> *Id.* at 152-53.

<sup>67</sup> *Id.* at 156.

<sup>68</sup> LOFTUS & KETCHAM, *supra* note 3, at 160.

<sup>69</sup> *Id.* at 166-67.

<sup>70</sup> *Id.* at 160-61.

<sup>71</sup> *Id.* at 158.

<sup>72</sup> *Id.* at 162.

<sup>73</sup> LOFTUS & KETCHAM, *supra* note 3, at 167.

<sup>74</sup> *Id.* at 168.

<sup>75</sup> *Id.* at 169.

<sup>76</sup> *Id.* at 162.

<sup>77</sup> Kanovitz, *supra* note 42, at 1210-11 & n.101.

<sup>78</sup> *Id.* at 1212. Because most courts have addressed the admissibility of hypnotically refreshed testimony, this Note will assume that memories recovered through therapeutic hypnosis are inadmissible or conditionally admissible as discussed *infra* notes 335-74 and accompanying text.

The psychological community is divided over the question of whether a person can in fact repress all memory of a traumatic childhood event and retrieve that memory later in life.<sup>79</sup> The broad range of circumstances under which these memories are retrieved raises additional questions about whether some recovered memories are more or less likely to be accurate than others.<sup>80</sup>

### A. *The Case for Recovered Memory*

Those who believe in the validity of recovered memories assert that repression operates as a defense mechanism, blocking out conscious memories of a terrifying or traumatic event.<sup>81</sup> Some kinds of events, they argue, are so horrible that a child's mind simply cannot acknowledge them.<sup>82</sup> Sexual abuse by a parent or a caretaker, they argue, is one of these events.<sup>83</sup> Not only is the abuse itself terrifying, but also it creates an irreconcilable conflict in the child's mind between seeing the abuser as a trusted caretaker and as a person who frightens and hurts them.<sup>84</sup> Thus, the child may repress the memory of the incident that created this loyalty conflict because his or her mind cannot handle the conflicting information.<sup>85</sup>

Proponents of this theory claim that victims can access these memories later in life, when they are in a safe and trusting environment.<sup>86</sup> They claim, however, that the repression is not complete.<sup>87</sup> Although the individual may have successfully blocked conscious memory of the trauma, emotional problems arising from that trauma can continue.<sup>88</sup> Thus, they argue, a person who has repressed a memory of abuse may still exhibit symptoms of abuse.<sup>89</sup> Many of the patients who later claim to have recovered memories enter therapy initially for

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*But see* Kanovitz, *supra* note 42, at 1260-62 (arguing that the rules of evidence about forensic hypnosis should not apply to therapeutic hypnosis).

<sup>79</sup> See *infra* notes 210-26 and accompanying text for discussion of division within the psychological community.

<sup>80</sup> See *infra* notes 157-70 for discussion of the level of suggestiveness in different therapeutic techniques.

<sup>81</sup> Kanovitz, *supra* note 42, at 1204; see LENORE TERR, *UNCHAINED MEMORIES: TRUE STORIES OF TRAUMATIC MEMORIES LOST AND FOUND* 6-7 (1994).

<sup>82</sup> Kanovitz, *supra* note 42, at 1203.

<sup>83</sup> *Id.* at 1199.

<sup>84</sup> TERR, *supra* note 81, at 15; see also Josephine A. Bulkley & Mark J. Horowitz, *Adults Sexually Abused as Children: Legal Actions and Issues*, 12 BEHAV. SCI. & L. 65, 66-67 (1994).

<sup>85</sup> See TERR, *supra* note 81, at 15; Kanovitz, *supra* note 42, at 1199.

<sup>86</sup> TERR, *supra* note 81, at 12; Ernsdorff & Loftus, *supra* note 38, at 138.

<sup>87</sup> Kanovitz, *supra* note 42, at 1205; see Barall, *supra* note 2, at 1491-92.

<sup>88</sup> Kanovitz, *supra* note 42, at 1205.

<sup>89</sup> Ernsdorff & Loftus, *supra* note 38, at 137; Kanovitz, *supra* note 42, at 1205.

problems like eating disorders, substance abuse or depression.<sup>90</sup> For the therapists who treat them, the intensity of their emotional suffering before and after any memories are recovered make their claims of abuse credible.<sup>91</sup>

Dr. Lenore Terr, a practicing psychologist in San Francisco and a frequent expert witness in repressed memory cases, classifies childhood trauma into two categories.<sup>92</sup> Type I trauma involves a single incident.<sup>93</sup> This type of trauma is likely to be remembered clearly by the child without any memory repression.<sup>94</sup> Type II trauma involves ongoing experiences, such as repeated abuse.<sup>95</sup> This trauma, she argues, is most likely to be repressed.<sup>96</sup> In her view, whole memories are repressed intact and can be recovered years later in much the same form.<sup>97</sup> According to Dr. Terr, the return of repressed memories can be "triggered" by visual cues or exposure to information about someone else's similar situation.<sup>98</sup>

In terms of the accuracy of retrieved memories, Dr. Terr suggests three factors that can indicate whether a recovered memory is true or false.<sup>99</sup> These factors are the patient's symptoms, the level of detail of the memory, and the level of emotion accompanying the report of the memory.<sup>100</sup> A patient with symptoms of emotional disturbance, a highly detailed memory, and a high degree of emotional affect during the telling is likely to be recovering a memory of a true historical fact.<sup>101</sup>

Proponents of recovered memory look to a number of areas for support.<sup>102</sup> First, the concept of repression as the mind's mechanism for avoiding conscious confrontation with unacceptable ideas has been

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<sup>90</sup> Ernsdorff & Loftus, *supra* note 38, at 137; Barall, *supra* note 2, at 1491-92.

<sup>91</sup> LOFTUS & KETCHAM, *supra* note 3, at 209 (citing a conversation with Ellen Bass, co-author of the book *The Courage to Heal*: "Survivors are in so much pain . . . why would anyone invent a story that involved so much anguish and suffering?").

<sup>92</sup> TERR, *supra* note 81, at 11; Barall, *supra* note 2, at 1490.

<sup>93</sup> TERR, *supra* note 81, at 11.

<sup>94</sup> *Id.* at 11, 27.

<sup>95</sup> *Id.* at 11.

<sup>96</sup> *Id.* at 12.

<sup>97</sup> *See id.* at 40; Barall, *supra* note 2, at 1491.

<sup>98</sup> *See* TERR, *supra* note 81, at 12-13; Barall, *supra* note 2, at 1491.

<sup>99</sup> Barall, *supra* note 2, at 1491.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1491-92.

<sup>102</sup> *See, e.g.,* LOFTUS & KETCHAM, *supra* note 3, at 215; Jonathan W. Schooler, *Seeking the Core: The Issues & Evidence Surrounding Recovered Accounts of Sexual Trauma*, 1994 CONSCIOUSNESS AND COGNITION 452; Barall, *supra* note 2, at 1476; Minouche Kandel & Eric Kandel, *Flights of Memory: Biology of Recovered Memory*, DISCOVER, May 1994, at 32; Nancy Wartick, *A Question of Abuse: Adults Who Suddenly Remember They Were Victims of Child Abuse*, AM. HEALTH, May 1993, at 62.

part of psychiatric parlance since Freud.<sup>103</sup> Freud believed that repression operated as a defense against intolerable thoughts, ideas or memories.<sup>104</sup> This is often referred to as "motivated forgetting," although in fact, according to psychoanalytic theory, the content is not forgotten but remains unconscious and active.<sup>105</sup> In other words, the content of what is repressed continues to influence the patient's behavior, attitudes and feelings even though it is not apparent on a conscious level.<sup>106</sup> Freud initially believed that what was repressed in his patients were actual memories of childhood trauma, specifically seduction by their fathers.<sup>107</sup> Ultimately, he concluded that his patients had instead repressed wishes and fantasies about their fathers that were unacceptable to their conscious minds.<sup>108</sup> His theories did, however, embrace the concept of repression.<sup>109</sup> Although experts disagree about the content of what is repressed and whether it involves actual experience or fantasy, modern psychoanalytic theory continues to accept this idea of repression as a defense mechanism.<sup>110</sup>

Second, proponents of recovered memory point to psychogenic amnesia as evidence of the phenomenon of forgetting in response to an emotional stimulus.<sup>111</sup> Psychogenic amnesia, unlike amnesias that result from a physical injury to the brain, is a loss of memory in response to a terrifying or traumatic event.<sup>112</sup> Such an event can disrupt the normal biological process of memory retention and storage.<sup>113</sup> A victim of such an experience can lose large pieces of memory, often forgetting personal information such as name and address in addition to the details of the event.<sup>114</sup> Thus, according to proponents, recognized phenomena suggest that the human brain has a mechanism to

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<sup>103</sup> Ernsdorff & Loftus, *supra* note 38, at 133-34 & n.16; Barall, *supra* note 2, at 1476-77.

<sup>104</sup> Barall, *supra* note 2, at 1476-77.

<sup>105</sup> Howard Shevrin, *Subliminal Perception and Repression*, in REPRESSION AND DISSOCIATION 103, 103 (Jerome L. Singer ed., 1990).

<sup>106</sup> *Id.*

<sup>107</sup> JEFFREY M. MASSON, THE ASSAULT ON TRUTH; FREUD'S SUPPRESSION OF THE SEDUCTION THEORY 122 (1984); Barall, *supra* note 2, at 1477-78.

<sup>108</sup> MASSON, *supra* note 107, at 122; Barall, *supra* note 2, at 1478.

<sup>109</sup> See Barall, *supra* note 2, at 1478.

<sup>110</sup> *Id.* at 1477.

<sup>111</sup> See LOFTUS & KETCHAM, *supra* note 3, at 215.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 216. Skeptics point out that psychogenic amnesia is not identical to repression: importantly, much information is lost that is not related to the trauma, the victims typically recover their memory within a short period of time, and the victims are usually conscious of having lost memory. *Id.* at 215-16.

repress events and feelings that are too painful to be consciously tolerated.<sup>115</sup>

Third, a phenomenon similar to repression has been recognized in combat veterans suffering from Post Traumatic Stress Disorder.<sup>116</sup> Scientists who have studied combat veterans have found that veterans who have experienced trauma frequently have no memory of entire days until fifteen to twenty years later.<sup>117</sup> Proponents of repressed memory point to this phenomenon as proof that the mind is capable of both repressing and later retrieving intolerable memories.<sup>118</sup>

Fourth, what scientists know about the biology of memory supports the proposition that the emotional reaction to trauma can be stored over time in the brain even if conscious awareness of the historical fact has been repressed.<sup>119</sup> Researchers believe that "explicit" or conscious memories are controlled by the temporal lobes and hippocampus within the brain, while "implicit" or unconscious memories are controlled by the automatic nervous system and the amygdala and cerebellum.<sup>120</sup> These two systems both come into play and communicate with each other when a new experience confronts the brain.<sup>121</sup> Biologists believe that, in an emotionally charged experience, the conscious memory may be stored in one part of the brain and the emotional content may be stored in another.<sup>122</sup> Thus, the emotional aftermath of a traumatic experience may continue to affect the individual even if conscious memory of the event has been suppressed or lost, because it is stored in and controlled by an entirely different part of the brain.<sup>123</sup>

Fifth, a number of studies indicate that the initial repression of intolerable memories is possible and even common.<sup>124</sup> A recent study of 129 women who had been treated as children for sexual abuse revealed that thirty-eight percent claimed no memory of the abuse, and a number of those who did remember the abuse reported having forgotten for a period of time.<sup>125</sup> A significant portion of the sample

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<sup>115</sup> See *id.*

<sup>116</sup> Wartick, *supra* note 102, at 62.

<sup>117</sup> *Id.*

<sup>118</sup> See *id.*

<sup>119</sup> See Kandel & Kandel, *supra* note 102, at 32.

<sup>120</sup> *Id.* at 36.

<sup>121</sup> *Id.* at 37.

<sup>122</sup> *Id.*

<sup>123</sup> See *id.* at 38.

<sup>124</sup> See Schooler, *supra* note 102, at 459 (discussing various studies of women who claim to have been sexually abused and women who are known to have been sexually abused).

<sup>125</sup> *Id.* at 458; Alison Bass, *Study Finds Traumatic Memories Can Be Recovered*, BOSTON GLOBE, Jan. 26, 1995, at 1.

reported some degree of repression of an event that was known to have happened to them.<sup>126</sup> Thus, proponents argue, the human mind commonly uses repression as a defense against childhood trauma.<sup>127</sup> An earlier study of fifty-three patients in treatment for sexual abuse revealed that sixty-four percent had experienced some memory loss about their abuse, and seventy-four percent claimed to have corroborating evidence of the abuse.<sup>128</sup> The similarities between what those who did recover memories remembered and what was known to have happened to them suggests that recovered memories can correspond to actual sexual abuse.<sup>129</sup>

Finally, proponents of recovered memory point to the very existence of a large number of patients who report these recovered memories as validation of the theory.<sup>130</sup> The stories the patients tell, they argue, are too vivid and too painful to be the product of imagination or fabrication.<sup>131</sup> The emotional troubles these patients have as adults are consistent with the kind of abuse that they remember, and would not be so consistent and so intense in response to a fabricated memory.<sup>132</sup>

### B. *The Case Against Recovered Memory*

Those who doubt the validity of recovered memories question the ability of the mind to store information over a prolonged period of time and retrieve it accurately.<sup>133</sup> After a period of years, or even decades, has passed, they argue, there is no way to distinguish a memory of a true historical fact from other things observed over time or the mind's own internal information (i.e., dreams, fantasies, wishes).<sup>134</sup> Furthermore, they argue, the highly directed and suggestive process by which many of these memories are retrieved casts further doubt on the premise that what is recovered is an independent memory of a true historical fact.<sup>135</sup> The emotional problems that are identified by clinicians as symptoms of sexual abuse are very broad and might encompass

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<sup>126</sup> See Schooler, *supra* note 102, at 458–59.

<sup>127</sup> See *id.* at 459.

<sup>128</sup> *Id.* at 456.

<sup>129</sup> *Id.*

<sup>130</sup> See LOFTUS & KETCHAM, *supra* note 3, at 209.

<sup>131</sup> *Id.*

<sup>132</sup> See TERR, *supra* note 81, at 161, 172.

<sup>133</sup> See Ernsdorff & Loftus, *supra* note 38, at 157, 158; *When Memories Collide*, *supra* note 46, at B33.

<sup>134</sup> LOFTUS & KETCHAM, *supra* note 3, at 175; Schooler, *supra* note 102, at 463; *When Memories Collide*, *supra* note 46, at B33.

<sup>135</sup> LOFTUS & KETCHAM, *supra* note 3, at 152, 158, 161, 170 (discussing therapeutic techniques and the dangers of suggestion involved in each one); Ernsdorff & Loftus, *supra* note 38, at 158–59.

any number of problems wholly unrelated to sexual abuse.<sup>136</sup> A therapist, therefore, in pursuing the question of sexual abuse with a patient, may simply be offering an understandable explanation for the patient's emotional problems.<sup>137</sup> The patient, according to the skeptics, may latch onto this explanation not because it is true, but because it is an answer.<sup>138</sup>

Repressed memories, according to the skeptics, may represent *something*—a fantasy, a dream, an internalization of something seen or heard—but they cannot be relied on as a representation of the truth.<sup>139</sup> Janice Haaken, a psychologist at Portland State University in Oregon, suggests that these memories should be seen as an emotional metaphor, rather than the literal truth.<sup>140</sup> A memory of sexual abuse, says Haaken, weaves together many elements of childhood that do not necessarily involve sexual abuse—ideas of parental power, authority and domination.<sup>141</sup> Thus, emotional problems arising from childhood conflicts that involve these kinds of issues, but no actual abuse, can very closely resemble emotional problems arising from sexual abuse.<sup>142</sup>

Those who doubt the validity of recovered memory find support in scientific knowledge about normal (non-repressed) memory, in studies concerning the possibility of implanting entirely false memories, in some of the information about the biology of memory, in evidence of highly suggestive techniques used by some therapists and, finally, in certain recovered memories that simply stretch credulity too far.<sup>143</sup> First, skeptics argue, information about normal memory casts serious doubt on the reliability of the contents of a recovered memory.<sup>144</sup> This information appears both to directly contradict the notion that the mind stores memory intact until it emerges into consciousness and to suggest that the influences to which a memory is subject at all stages are overwhelming.<sup>145</sup>

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<sup>136</sup> LOFTUS & KETCHAM, *supra* note 3, at 154–55.

<sup>137</sup> See Loftus, *supra* note 1, at 525.

<sup>138</sup> See *id.*

<sup>139</sup> See Tom McNamee, *When Memory Lies; Bernardin Case Heightens Debate Over Repression*, CHI. SUN-TIMES, Mar. 6, 1994, at 1.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; see also Loftus, *supra* note 1, at 525.

<sup>142</sup> See McNamee, *supra* note 139, at 1.

<sup>143</sup> See, e.g., LOFTUS & KETCHAM, *supra* note 3, at 99, 141; Ernsdorff & Loftus, *supra* note 38, at 155; Kandel & Kandel, *supra* note 102, at 38; Leon Jaroff, *Lies of the Mind*, TIME, Nov. 29, 1993, at 52, 59.

<sup>144</sup> Ernsdorff & Loftus, *supra* note 38, at 155.

<sup>145</sup> See *id.*

Memory researchers assert that "normal" memories are subject to influences at their three basic stages: perception, retention and retrieval.<sup>146</sup> At the perception stage, factors including the time of exposure, familiarity with the subject matter of the event, and the stressfulness of the incident remembered can influence the accuracy of the memory.<sup>147</sup> Thus, research on memory suggests that, as the memory enters the mind, even before it has been stored, external factors can undermine its accuracy.<sup>148</sup>

During the retention stage, the storage of the memory between its occurrence and its resurfacing in the conscious mind, the memory is also influenced by external information.<sup>149</sup> Studies of normal memory have shown that it is relatively easy to induce inaccurate memories by exposure to new facts before reporting.<sup>150</sup> This exposure may be direct, by deliberately telling the subject something about the event that he or she is supposed to remember, or more subtle, by casual exposure to other people's conversations or news reports.<sup>151</sup> These studies involved normal memory, and thus did not test the effects of such external information on a memory over the long periods of time associated with repressed memories.<sup>152</sup> Skeptics argue that a repressed memory is especially prone to influence from external factors because it is often decades old by the time it surfaces and because it is not consciously rehearsed in the way that non-repressed memories usually are.<sup>153</sup> Thus, prolonged exposure to external information may have an even greater influence on the content of the repressed memory as it ultimately resurfaces than the effect on relatively short-term, non-repressed memories.<sup>154</sup>

Finally, memory research suggests that normal memories are influenced at the retrieval stage by the environment in which they are retrieved, subtle expectations created in the subject's mind, the retrieval techniques used and the individuals present.<sup>155</sup> Skeptics argue

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 156.

<sup>148</sup> *See id.*

<sup>149</sup> Ernsdorff & Loftus, *supra* note 38, at 156.

<sup>150</sup> *Id.* Numerous studies have revealed what is known as the "Misinformation Effect": the change in reporting arising from post-event misinformation fed to a subject. *Id.* at 156 & n.139.

<sup>151</sup> Telephone Interview with Dr. Elizabeth Loftus, Professor of Psychology, Adjunct Professor of Law, University of Washington (Mar. 26, 1995); *see* Ernsdorff & Loftus, *supra* note 38, at 156-57 & n.142.

<sup>152</sup> *See* Ernsdorff & Loftus, *supra* note 38, at 157.

<sup>153</sup> *Id.*

<sup>154</sup> *See id.*

<sup>155</sup> *Id.* at 158.



that the circumstances frequently surrounding the retrieval of allegedly repressed memories invite inaccuracies.<sup>156</sup> They point to the techniques espoused by therapists and writers in the incest-recovery movement as evidence of the highly suggestive nature of the process by which victims recover memories.<sup>157</sup> The direct question about sexual abuse is employed in order to signal to the client that she will be believed if she discloses abuse.<sup>158</sup> This question, some argue, might have the additional effect of creating an expectation in the patient's mind that she will, or should, recover memories of sexual abuse.<sup>159</sup> The use of "symptom lists" with patients may also create a danger of suggestion.<sup>160</sup> Loftus warns that many of these symptoms might be perfectly harmless (e.g., wearing baggy clothes) unless read in the context of other symptoms that more directly suggest sexual abuse (e.g., hypersexuality as a child).<sup>161</sup> Thus, the symptom lists might lead a patient to believe she has been sexually abused, even if the only symptoms that match are the more innocuous ones that could also reflect a myriad of other problems or experiences.<sup>162</sup>

Skeptics also criticize the techniques that involve the patient "telling a story" about what might have happened.<sup>163</sup> Imagistic work, journal writing and art therapy all share this feature.<sup>164</sup> Telling or imagining what might have happened, Loftus argues, encourages patients to depart from the realm of what they know and to indulge in fantasy and imagination.<sup>165</sup> This blurred distinction between memory and imagination may become problematic if the memories retrieved in this fashion are relied upon for their historical truth.<sup>166</sup>

The use of group therapy also draws criticism from the skeptics.<sup>167</sup> Group therapy, they argue, creates a different kind of pressure than any exerted by the therapist alone.<sup>168</sup> The patient is placed in an environment in which all of her peers either have recovered or are attempting to recover memories of childhood sexual abuse.<sup>169</sup> This

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<sup>156</sup> See *id.*

<sup>157</sup> E.g., Ernsdorff & Loftus, *supra* note 38, at 158.

<sup>158</sup> *Id.* at 151.

<sup>159</sup> *Id.* at 158.

<sup>160</sup> See *id.* at 160; LOFTUS & KETCHAM, *supra* note 3, at 152-53.

<sup>161</sup> LOFTUS & KETCHAM, *supra* note 3, at 156.

<sup>162</sup> See *id.*

<sup>163</sup> *Id.* at 158.

<sup>164</sup> See *supra* notes 64-78 for description of therapeutic techniques.

<sup>165</sup> LOFTUS & KETCHAM, *supra* note 3, at 158.

<sup>166</sup> See Ernsdorff & Loftus, *supra* note 38, at 160.

<sup>167</sup> LOFTUS & KETCHAM, *supra* note 3, at 169.

<sup>168</sup> See *id.* at 170.

<sup>169</sup> *Id.*

environment, they argue, combined with the other suggestions or cues from the therapist, creates an expectation in the patient's mind that she, too, should recover a memory of sexual abuse.<sup>170</sup>

All of these techniques, skeptics argue, involve some degree of suggestion and a high degree of speculation and imagination.<sup>171</sup> If the patient is validated at each step, even fantasies or dreams begin to take on the form of a real, independent memory.<sup>172</sup> People on both sides of the debate tend to agree that therapy is a search for healing, not historical truth.<sup>173</sup> The primary concern of the therapists is not investigating the historical truth of a memory, and they are therefore unlikely to counter the effects of suggestive and speculative techniques with questions and discussions that would more thoroughly probe the veracity of the patient's reports.<sup>174</sup>

Even if the level of suggestiveness in therapy is low, according to skeptics, the nature of the therapeutic relationship itself can influence the patient's memory and encourage the emergence of a false memory.<sup>175</sup> Since Freud's writings and theories first became prominent, the psychoanalytical profession has recognized that transference plays an important role in psychotherapy.<sup>176</sup> The theory of transference rests on the premise that patients in therapy see their therapist not as a detached professional, but as a representation of important childhood caretakers about whom the patient still has unresolved emotional issues.<sup>177</sup> This transference influences the content of what a patient says to a therapist because the patient is searching for certain kinds of responses from the therapist, depending on who or what the therapist is supposed to represent.<sup>178</sup> Thus, if a patient is under the pull of a strong transference with his or her therapist, the power of even a slight suggestion from the therapist might be enough to produce an altered or false memory.<sup>179</sup>

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<sup>170</sup> See *id.*

<sup>171</sup> See *id.* at 141; Ernsdorff & Loftus, *supra* note 38, at 158.

<sup>172</sup> See Ernsdorff & Loftus, *supra* note 38, at 162-63.

<sup>173</sup> See *id.* at 161; Paul R. McHugh, "Recovered Memory": *Exploring the Confusion*, *Newsday*, June 30, 1994, at 6 (citing study indicating that 50% of therapists say they make no effort to distinguish between true and false memory even when criminal actions are involved).

<sup>174</sup> See Ernsdorff & Loftus, *supra* note 38, at 161; McHugh, *supra* note 173, at 6.

<sup>175</sup> See Kanovitz, *supra* note 42, at 1244-45, 1246.

<sup>176</sup> *Id.* at 1244.

<sup>177</sup> Kanovitz, *supra* note 42, at 1244; see SPENCE, *supra* note 61, at 94-95.

<sup>178</sup> SPENCE, *supra* note 61, at 95. "Under the press of a strong transference . . . what the patient is saying about the past must be translated into what he is demanding of the present. If he needs to be pitied . . . he might exaggerate the misery of his childhood; if he wants to be praised for being an exceptional analytic patient, he might generate a crystal-clear memory of an infantile event." *Id.*

<sup>179</sup> See *id.*

Though inaccuracies in the details of memory do not lead to the conclusion that whole memories can appear out of nowhere with no factual basis, some preliminary studies, as well as anecdotal evidence, suggest that whole memories can be implanted in a person's mind.<sup>180</sup> One of the more famous accounts of a false memory comes from child psychologist Jean Piaget, who remembered very clearly an attempted kidnapping of him when he was two years old.<sup>181</sup> This memory was vivid and detailed, and Piaget never questioned its authenticity.<sup>182</sup> When he was fifteen, however, the nurse who had been with him that day wrote to his parents and confessed that she had made the entire story up.<sup>183</sup> Thus, Piaget had absorbed the information initially given him by his nurse and his parents and transformed it into what seemed an independent memory of the event.<sup>184</sup>

Another example of an implanted memory comes from the case of Paul Ingram, a man accused of sexually abusing his daughters and participating in satanic rituals.<sup>185</sup> During the investigation, Ingram repeatedly responded to the accusations by denying them, then thinking about it, recovering a detailed memory of the events, and confessing.<sup>186</sup> Psychologist Richard Ofshe was hired by the prosecution to assist with the interviewing of Ingram and his family.<sup>187</sup> As a test of Ingram's credibility, Ofshe fabricated a false scenario of a particular act of abuse that Ingram's children said never happened.<sup>188</sup> Ingram's response to this scenario was exactly the same as his response to the others: he claimed no memory of it, then went to think and "pray on" the issue, and returned with a detailed memory and a confession.<sup>189</sup>

Initial observations from a study conducted by Dr. Elizabeth Loftus, a psychology professor at the University of Washington, also indicate that implanting an entire false memory is possible.<sup>190</sup> Loftus attempted to implant in her subjects a memory of being lost in a shopping mall at a young age.<sup>191</sup> During the initial observations, sub-

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<sup>180</sup> Loftus, *supra* note 1, at 531. But see Karen A. Olio, *Truth in Memory*, 49 AM. PSYCHOL. 442, 442 (1994) (arguing in response to Loftus's information that no evidence exists to show that something as traumatic as a memory of sexual abuse can be implanted in a person's mind).

<sup>181</sup> LOFTUS & KETCHAM, *supra* note 3, at 76-77.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Loftus, *supra* note 1, at 532-33.

<sup>186</sup> *Id.* at 533.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> LOFTUS & KETCHAM, *supra* note 3, at 97-99; Loftus, *supra* note 1, at 532.

<sup>191</sup> Loftus, *supra* note 1, at 532.

jects were given descriptions of four events occurring at around age five, three of which were true and one of which was entirely fabricated.<sup>192</sup> They were instructed to write about all four events every day for five days, telling any facts or details remembered, and writing "I don't remember" at any time when no memory was forthcoming.<sup>193</sup> One subject, Chris, provided additional details to the false memory each day in the five day journal, including descriptions of people's clothing and actions, his own feelings, and an entirely added memory of what a particular person said to him.<sup>194</sup> A few weeks later, Chris was asked to rate the four memories on how clear they were.<sup>195</sup> The false shopping mall memory received the second highest rating for clarity.<sup>196</sup> Finally, Chris was informed that one of the four memories was false.<sup>197</sup> When asked to guess which one, he selected one of the real memories.<sup>198</sup> Upon being told that the shopping mall memory was the false one, he had difficulty believing it, insisting that he had memories of the event.<sup>199</sup> Researchers inspired a similar reaction in twenty percent of the subjects involved in this study.<sup>200</sup>

In addition, the biology of memory provides some indication that a recovered memory might be hopelessly entangled with imagination and fantasy.<sup>201</sup> Stephen Kosslyn, a researcher at Harvard, found that the brain area involved with perceiving an image and storing it is the same area involved in imagining an image.<sup>202</sup> Thus, the accuracy of a retrieved memory might be legitimately in question, because actual perception and imagination share such close quarters in the brain and might intermingle.<sup>203</sup>

Finally, skeptics argue, some of the claims arising from recovered memories simply defy belief.<sup>204</sup> A 1990 study of psychologists showed that 800 (one-third of the sample) had treated at least one patient who

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<sup>192</sup> LOFTUS & KETCHAM, *supra* note 3, at 97.

<sup>193</sup> *See id.*

<sup>194</sup> *Id.* at 97-98.

<sup>195</sup> *Id.* at 98.

<sup>196</sup> *Id.*

<sup>197</sup> LOFTUS & KETCHAM, *supra* note 3, at 98.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 98-99. In order to ensure that the event had not actually happened, Loftus conducted a similar procedure with Chris's mother, who came up with no memory of the incident. *Id.* at 98.

<sup>200</sup> Telephone Interview with Dr. Elizabeth Loftus, Professor of Psychology, Adjunct Professor of Law, University of Washington (Mar. 26, 1995).

<sup>201</sup> Kandel & Kandel, *supra* note 102, at 38.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Jaroff, *supra* note 143, at 59; *see* Schooler, *supra* note 102, at 463.

claimed to have been a victim of satanic ritual abuse.<sup>205</sup> A California referral service for survivors reports that it receives more than 5000 calls a year from people who believe they have been victims of satanic ritual abuse.<sup>206</sup> Many of these stories describe highly organized and highly brutal rituals, involving numerous people and sacrifices of infants, fetuses and adults.<sup>207</sup> Yet, despite what appears to be an alarming number of incidents, involving large numbers of people, law enforcement agencies including the FBI have uncovered no remains of sacrificed infants, fetuses or adults, and no additional eyewitnesses.<sup>208</sup> The combination of the bizarre nature of these reports and the complete lack of physical evidence of such behavior lead many of the skeptics to question the authenticity of the memories themselves.<sup>209</sup>

Additionally, many of the recovered memories that concern events that occurred prior to age two lead some to question their veracity.<sup>210</sup> According to researchers, the hippocampus, the area of the brain that processes long term conscious memories, is not fully developed in humans until age three or four.<sup>211</sup> The human brain may not be capable of processing and storing long term conscious memories of events that occurred at a young age.<sup>212</sup> Thus, a memory of incest at such a young age may be inherently suspect.<sup>213</sup>

None of the skeptics have suggested that patients are consciously fabricating their stories of abuse, and very few have seriously suggested that therapists are deliberately implanting false memories in their patients.<sup>214</sup> Rather, doubters of repressed memory suggest that a combination of inexperience, overzealousness and the utility of sexual abuse as a simple answer to the complex issues that arise in therapy has led a great number of therapists to unwittingly influence their patients' memories.<sup>215</sup>

### C. *Unanswered Questions: The Current Status of the Recovered Memory Debate*

Although some studies have suggested that the initial repression of a traumatic memory is a documented and even common occur-

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<sup>205</sup> Jaroff, *supra* note 143, at 59.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See Jaroff, *supra* note 143, at 59.

<sup>210</sup> See Wartick, *supra* note 102, at 62.

<sup>211</sup> *Id.*; see also TERR, *supra* note 81, at 226.

<sup>212</sup> Wartick, *supra* note 102, at 62.

<sup>213</sup> See *id.*

<sup>214</sup> See TERR, *supra* note 81, at 162.

<sup>215</sup> See Loftus, *supra* note 1, at 525; Reich, *supra* note 46, at 35; McNamee, *supra* note 139.

rence, no similar studies exist to establish either that those memories are accurate once they are retrieved or that all people who believe they have such memories actually do.<sup>216</sup> The studies cited by both sides are subject to attack as incomplete.<sup>217</sup> Proponents of repressed memory attack Loftus's shopping mall experiment as indeterminative, arguing that the experience of being lost in a shopping mall does not begin to approach the trauma of being molested as a child, and therefore proves nothing about the possibility of implanting a memory of a real trauma.<sup>218</sup> The studies of known sexual abuse victims that show the possibility and frequency of repression also have met with criticism.<sup>219</sup> According to Loftus, they do not show that people can repress the kinds of repeated, prolonged incidents of abuse that appear in many recovered memory cases.<sup>220</sup> Likewise, they do not show whether memories retrieved by people without a known history of sexual abuse are accurate or reliable.<sup>221</sup>

Meaningful experimental research on the accuracy and reliability of recovered traumatic memories may be ethically impossible.<sup>222</sup> One would need, perhaps, to study people who are known not to have been sexually abused but who are experiencing emotional problems to determine whether commonly used therapeutic techniques could produce memories of abuse.<sup>223</sup> Two important factors make this kind of study unlikely to happen.<sup>224</sup> First, repressed memory advocates might not accept that anyone can know for sure that they have never been sexually abused.<sup>225</sup> Second, the ethics of deliberately implanting a devastating memory in an emotionally vulnerable subject are highly questionable.<sup>226</sup>

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<sup>216</sup> See Schooler, *supra* note 102, at 452-53.

<sup>217</sup> See *id.* at 453 (describing the claims on both sides of the debate that neither side has proven the validity of its theories).

<sup>218</sup> Olio, *supra* note 180, at 442.

<sup>219</sup> See Loftus, *supra* note 1, at 521-22.

<sup>220</sup> Telephone Interview with Dr. Elizabeth Loftus, Professor of Psychology, Adjunct Professor of Law, University of Washington (Mar. 26, 1995).

<sup>221</sup> *Id.*

<sup>222</sup> Ernsdorff & Loftus, *supra* note 38, at 133.

<sup>223</sup> See LOFTUS & KETCHAM, *supra* note 3, at 90 (describing the type of information that might be needed to prove whether memories of traumatic events could be implanted).

<sup>224</sup> See *id.* at 100, 176.

<sup>225</sup> See *id.* at 176 (quoting television personality Roseanne, who has claimed to have repressed memories of childhood sexual abuse: "When someone asks you 'were you sexually abused as a child?' there are only two answers: one of them is 'yes' and one of them is 'I don't know.' You can't say 'no.'").

<sup>226</sup> See *id.* at 100. Dr. Loftus found resistance from the Human Subjects Committee to her shopping mall experiment, because the Committee was concerned about the ethics of deliberately implanting a false memory into a human subject. *Id.* With some modifications, including

In the meantime, the rift in the professional community is omnipresent.<sup>227</sup> The issue pits clinical psychologists and their personal experiences with their patients' vivid and painful memories against memory researchers and their academic understanding of memory.<sup>228</sup> The recovered memory debate, according to a representative of the American Psychological Association ("APA"), is "tearing our membership apart."<sup>229</sup> The APA established a panel of six professionals, representing both sides of the debate, to prepare a report on the issue in an attempt to reconcile these differences.<sup>230</sup> The panel released a preliminary report in 1994, which indicated that, based on the latest research, it is possible for victims of trauma to experience memory disturbance, but it is also possible to construct false yet convincing pseudomemories for events that never occurred.<sup>231</sup> Thus, even the efforts of the APA to bring some kind of resolution to this issue have revealed only that both sides may be right some of the time.

The debate in the psychological community over repressed memory leaves the legal profession with very little guidance as to the reliability of these memories as evidence in a court of law.<sup>232</sup> Although not all of these cases find their way into a courtroom, many do.<sup>233</sup> Some therapists encourage their patients to take legal action as a means of taking control over their lives and "devictimizing" themselves.<sup>234</sup> Still others are pushed to a civil suit by the cost of their ongoing treatment.<sup>235</sup> As a result, large numbers of civil and criminal suits are finding their way into the courtroom, often brought on the strength of a recovered memory.<sup>236</sup> The consequences for a criminal defendant are steep, as are the financial consequences for a defendant in a civil suit.<sup>237</sup>

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efforts to make sure subjects were not emotionally troubled in the beginning, the study was approved. *Id.*

<sup>227</sup> Muriel Dobbin, *Jury's Still Out on Validity of Hidden Memories*, SACRAMENTO BEE, Mar. 9, 1994 at E1.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *When Memories Collide*, *supra* note 46, at B33. According to Newsday, the report also suggested that the phenomenon of recovered memory is a rare one, but the article did not define what was meant by "rare." *See id.*

<sup>232</sup> *See id.*

<sup>233</sup> *Id.* at B33; *see also* Reich, *supra* note 46, at 33.

<sup>234</sup> LOFTUS & KETCHAM, *supra* note 3, at 173-74 (citing sections in two popular self-help books, *The Courage to Heal* and *Secret Survivors*, dedicated to the costs and benefits of suing the perpetrator); Ernsdorff & Loftus, *supra* note 38, at 140 n.59.

<sup>235</sup> LOFTUS & KETCHAM, *supra* note 3, at 174.

<sup>236</sup> *See* Kanovitz, *supra* note 41, at 1193; Reich, *supra* note 46, at 33; *When Memories Collide*, *supra* note 46, at B33.

<sup>237</sup> *See* Loftus, *supra* note 1, at 518 (George Franklin convicted of first-degree murder on the strength of his daughter's recovered memory); LOFTUS & KETCHAM, *supra* note 3, at 261 (Paul

Even for defendants who prevail in court, the financial and personal cost of the process itself can be devastating.<sup>238</sup> Therefore, courts have good reason to evaluate the recovered memories that are the underpinnings of these legal battles and to consider the question of whether, and under what circumstances, such memories make competent testimony.<sup>239</sup>

Thus far, the competence of witnesses to testify to recently recovered memories has been directly challenged only in situations where the memories were recovered through hypnosis.<sup>240</sup> This may change, however, as plaintiffs bring more actions in the wake of widespread expansions to statutes of limitations.<sup>241</sup> If confronted with a challenge to memories recovered through therapy but without the use of hypnosis, courts may find guidance in the treatment of hypnotically refreshed testimony over the past decade.<sup>242</sup>

### III. HYPNOTICALLY REFRESHED TESTIMONY

When testimony based on hypnotically refreshed memories was first challenged in the courts, courts did not consider the testimony troublesome.<sup>243</sup> The courts considered witnesses competent to testify and considered the memory-refreshing process analogous to the use of written memoranda to refresh recollection.<sup>244</sup> The trier of fact was entrusted with the responsibility, based on the witness's testimony, the opposing party's cross-examination, and expert testimony on the reliability of hypnosis, to determine the accuracy of the memories related in the testimony.<sup>245</sup>

The Maryland Court of Special Appeals in *Harding v. State* was the first case to squarely address the issue of admissibility of hypnotically

Ingram serving a 20 year sentence for rape as a result of his daughters' recovered memories and his own subsequent recovered memory and confession); *Brelis*, *supra* note 16, at 1 (jury verdict of \$500,000 in damages on the strength of Jennifer Hoult's recovered memory).

<sup>238</sup> See *LOFTUS & KETCHAM*, *supra* note 3, at 136-37. Doug Nagle, accused of sexual abuse on the strength of his daughter's recovered memory, was ultimately acquitted of all charges. *Id.* at 136. During this process, however, his marriage disintegrated and all three of his children severed all contact with him. *Id.*

<sup>239</sup> See *Ernsdorff & Loftus*, *supra* note 38, at 162.

<sup>240</sup> See, e.g., *Borawick v. Shay*, 842 F. Supp. 1501, 1505 (D. Conn. 1994), *aff'd*, 68 F.3d 597 (2d Cir. 1995); *McGlaufflin v. State*, 857 P.2d 366, 369 (Alaska Ct. App. 1993); *State v. Varela*, 817 P.2d 731, 733 (N.M. Ct. App. 1991); *West v. Howard*, 601 N.E.2d 528, 531 (Ohio Ct. App. 1991).

<sup>241</sup> See *Ernsdorff & Loftus*, *supra* note 38, at 144-45; *Kanovitz*, *supra* note 42, at 1193-94.

<sup>242</sup> *Ernsdorff & Loftus*, *supra* note 38, at 162, 165-66; see *Barall*, *supra* note 2, at 1486 n.47.

<sup>243</sup> *Kanovitz*, *supra* note 42, at 1252-53; see *Harding v. State*, 246 A.2d 302, 306 (Md. Ct. Spec. App. 1968).

<sup>244</sup> *Kanovitz*, *supra* note 42, at 1252.

<sup>245</sup> *Id.* at 1253.



refreshed testimony.<sup>246</sup> The *Harding* court held that the fact of hypnosis was an issue of credibility, not admissibility, and that previously hypnotized witnesses were competent to testify.<sup>247</sup> In *Harding*, the prosecuting witness had serious gaps in her memory immediately after being stabbed.<sup>248</sup> She underwent hypnosis before the trial in order to retrieve her memory of the important details.<sup>249</sup> At trial, she testified to the memories she retrieved while under hypnosis including, among other things, the identity of the defendant as her assailant.<sup>250</sup> The psychologist who hypnotized her also testified to the details of the hypnotic session and to his own qualifications to perform such hypnosis.<sup>251</sup>

On appeal, the court reasoned that the witness stated she was testifying from her own recollection, and the fact that she had told different stories or had been hypnotized concerned only the weight that should be given to her testimony.<sup>252</sup> Questions of weight and credibility, the court reasoned, properly belonged to the trier of fact.<sup>253</sup> Thus, the court held that the witness's hypnotically refreshed testimony was admissible.<sup>254</sup>

For almost a decade, numerous courts in other jurisdictions followed the *Harding* rule, considering questions of the reliability of hypnotically refreshed memory to be within the province of the jury as a question of weight and credibility.<sup>255</sup> During the late 1970s and early 1980s, however, courts began increasingly to question the reliability of hypnotically refreshed memory.<sup>256</sup> Scientific literature began to illuminate known dangers of hypnosis, and legal commentators began to present these studies and opinions to the courts.<sup>257</sup> Between 1980 and 1990, a majority of jurisdictions abandoned the original proposition that a hypnotized witness was presumed competent.<sup>258</sup> Those ju-

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<sup>246</sup> *Id.* at 1252 n.292; see *Harding*, 246 A.2d at 306.

<sup>247</sup> *Harding*, 246 A.2d at 306.

<sup>248</sup> *Id.* at 305.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 306-07.

<sup>252</sup> *Harding*, 246 A.2d at 306.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> See Kanovitz, *supra* note 42, at 1252 n. 292.

<sup>256</sup> See cases cited *infra* notes 330, 332, 333.

<sup>257</sup> See generally Bernard L. Diamond, *Inherent Problems in the Use of Pre-Trial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313 (1980); Marín T. Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311 (1979). Orne's article introduced the procedural safeguards against unreliability that were later adopted by many courts which declined to bar hypnotically refreshed testimony altogether. See *State v. Hurd*, 432 A.2d 86, 95-96 (N.J. 1981).

<sup>258</sup> See cases cited *infra* notes 330, 332, 333.

risdictions that abandoned the *Harding* rule treated hypnotically refreshed testimony in two different ways.<sup>259</sup> Some courts viewed hypnosis as suspect and inherently unreliable and began to bar its admission entirely.<sup>260</sup> Others considered hypnosis potentially but not consistently reliable, and therefore required trial courts to make a pretrial finding of reliability before admitting the testimony.<sup>261</sup>

#### A. *Hypnotically Refreshed Testimony as Inadmissible*

Many of the courts that found hypnotically refreshed testimony inherently unreliable and thus inadmissible rested their findings on the applicability of the *Frye* requirement of general scientific acceptance to hypnosis and hypnotically refreshed testimony.<sup>262</sup> In 1923, in *Frye v. United States*, the United States Court of Appeals for the District of Columbia Circuit held that federal courts could admit testimony or evidence based on a scientific procedure or theory only if the procedure or theory was sufficiently established to have gained general acceptance in the relevant scientific community.<sup>263</sup> The language of the *Frye* test has since been superseded by the Federal Rules of Evidence in the federal courts, but the principle that a procedure or theory must be scientifically valid before evidence based on that procedure or theory can be admissible remains in force.<sup>264</sup> In 1993, in *Daubert v. Merrell Dow Pharmaceuticals*, the United States Supreme Court held that, in federal trials, the language of the Federal Rules of Evidence, not *Frye*, controlled the admissibility of such evidence.<sup>265</sup> The Court held, however, that the trial judge retained the responsibility of determining the scientific validity of the underlying reasoning or methodology.<sup>266</sup> In reaching this determination, the *Daubert* Court held, the trial court must consider whether the theory has been or can be tested, whether it has been published and subjected to peer review, whether it has attracted widespread acceptance in a relevant scientific community, and its known or potential error rate.<sup>267</sup> Thus, while the *Frye* rule of general acceptance as the only measure of admissibility has been superseded by the Federal Rules of Evidence in federal courts, under

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<sup>259</sup> See *id.* and accompanying text for description of different approaches.

<sup>260</sup> See cases cited *infra* note 332.

<sup>261</sup> See cases cited *infra* notes 330, 333.

<sup>262</sup> See cases cited *infra* note 332.

<sup>263</sup> 293 F. 1013, 1014 (D.C. Cir. 1923). The evidence in question in *Frye* was expert testimony about the results of a systolic blood pressure lie detector test. *Id.*

<sup>264</sup> See *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2794-95 (1993).

<sup>265</sup> *Id.* at 2793.

<sup>266</sup> *Id.* at 2796.

<sup>267</sup> *Id.* at 2796-97.

*Daubert*, evidence based on a scientific theory or procedure must still pass a preliminary test of validity.<sup>268</sup>

In 1980, the Supreme Court of Minnesota in *State v. Mack* held hypnotically refreshed testimony inadmissible because it failed to satisfy the requirements of scientific acceptance of reliability under *Frye*.<sup>269</sup> In *Mack*, the prosecuting witness was originally brought to the hospital with cuts in her vagina.<sup>270</sup> She first told doctors that she had been involved in sexual activity, and later that she had been in a motorcycle accident.<sup>271</sup> Before the trial, she agreed to be hypnotized to recover her memory of her assault.<sup>272</sup> After a hearing on the admissibility of hypnotically refreshed testimony, the trial court certified the question to the state supreme court.<sup>273</sup> Five expert witnesses testified to the effects and reliability of hypnosis, and numerous amici filed briefs on both sides of the issue.<sup>274</sup>

Relying on the expert testimony from the pretrial hearing, the Supreme Court of Minnesota noted the recognized dangers of hypnosis.<sup>275</sup> First, it stated that a hypnotized subject is highly susceptible to suggestion, even where such suggestion is subtle or unintended.<sup>276</sup> Second, the court determined that a hypnosis subject is prone to confabulate, or fill gaps, in order to present a coherent story.<sup>277</sup> Finally, the court noted the expert testimony indicating that a memory produced under hypnosis, regardless of its truth, becomes hardened in the subject's mind, giving that subject a heightened confidence in its truth.<sup>278</sup> The court further noted that even practitioners of hypnosis testified that hypnosis did not need to be historically accurate in order to be therapeutically useful.<sup>279</sup> Thus, the court reasoned, because practitioners do not necessarily seek historical, verifiable truth, the results of their treatment may be suspect in the context of a courtroom.<sup>280</sup>

The court held that the standard of general acceptance by the relevant scientific community established in *Frye* should apply to hyp-

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<sup>268</sup> *Id.* at 2794-95.

<sup>269</sup> 292 N.W.2d 764, 768 (Minn. 1980).

<sup>270</sup> *Id.* at 766.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 767.

<sup>273</sup> *Id.* at 765.

<sup>274</sup> *Mack*, 292 N.W.2d at 765-66.

<sup>275</sup> *Id.* at 768-69.

<sup>276</sup> *Id.* at 768.

<sup>277</sup> *Id.* at 768-69.

<sup>278</sup> *Id.* at 769.

<sup>279</sup> *Mack*, 292 N.W.2d at 768.

<sup>280</sup> *Id.*

notically refreshed testimony.<sup>281</sup> The court reasoned that, although hypnosis was not strictly analogous to the results of mechanical testing typically governed by *Frye*, the best expert testimony indicates that no expert can determine whether memory induced by hypnosis is accurate or true.<sup>282</sup> In response to the prosecution's contention that admissibility of the testimony should not be governed by *Frye* because it involves an individual's statement of his or her own recollection rather than a scientific procedure, the court reasoned that the hypnotized witness's testimony is not equivalent to the testimony of regular witnesses.<sup>283</sup> Hypnosis can bring forth "memories" that do not exist, and the "hardening" of memory insulates the hypnotized witness from attack on cross-examination, unlike normal, untainted memory.<sup>284</sup> Thus, the court held that the *Frye* rule applied to hypnotically refreshed testimony.<sup>285</sup> The court further held that, under that rule, the science of hypnosis was too unreliable to warrant admission of such testimony.<sup>286</sup>

In 1981, in *State v. Mena*, the Arizona Supreme Court held hypnotically refreshed testimony inadmissible.<sup>287</sup> In *Mena*, a victim/witness who had inadequate memory of his attack agreed to undergo hypnosis to recover his recollection of the event.<sup>288</sup> The court in *Mena* reviewed the *Harding* decision and its progeny, noting the lack of analysis of the dangers of hypnosis in those cases.<sup>289</sup> The court then identified flaws in the two basic premises underlying *Harding* and its progeny.<sup>290</sup> The first premise was that the witnesses stated that they were testifying from their own recollection.<sup>291</sup> The second was that cross-examination would enable a jury to make the appropriate determinations about the witnesses's credibility.<sup>292</sup> With respect to the first premise, the *Mena* court reasoned that the evidence that suggests that a witness, after hypnosis, has no way to tell what are true recollections and what are simply the

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 769.

<sup>284</sup> *Mack*, 292 N.W.2d at 769-70.

<sup>285</sup> *Id.* at 768.

<sup>286</sup> *Id.* at 772.

<sup>287</sup> 624 P.2d 1274, 1279 (Ariz. 1981). This holding reversed the decision of the state court of appeals, which cited "respectable authority for the proposition that hypnotically adduced testimony is admissible, the fact of hypnosis affecting its credibility but not its admissibility." *Id.* at 1276. At this time, the majority of jurisdictions continued to follow the *Harding* rule. *Id.* at 1277.

<sup>288</sup> *Id.* at 1276.

<sup>289</sup> *Id.* at 1277-78.

<sup>290</sup> *Id.* at 1278.

<sup>291</sup> *Id.*

<sup>292</sup> *Mena*, 624 P.2d at 1278.

product of hypnosis undermined the value of a witness's assertions that the testimony reflected his or her own recollections.<sup>293</sup> The court further declared that the second assumption was fatally undermined by the authorities that show hypnosis subjects' increased belief in the veracity of their refreshed memories, regardless of their actual truth, making effective cross-examination impossible.<sup>294</sup> Thus, the court held that hypnotically refreshed testimony had been shown to be unreliable and was therefore inadmissible at trial.<sup>295</sup>

### B. *Hypnotically Refreshed Testimony as Conditionally Admissible*

Not all courts disturbed by the idea of hypnotically refreshed testimony responded with a per se rule of inadmissibility.<sup>296</sup> In 1981, the New Jersey Supreme Court decided *State v. Hurd*, creating procedural safeguards against unreliability that became widely used in those jurisdictions that did not bar hypnotically refreshed testimony entirely.<sup>297</sup> The New Jersey court held that hypnotically refreshed testimony should be judged according to the standards of general scientific acceptance, which could be accomplished by admitting the evidence only when the hypnotist followed particular procedural safeguards designed to ensure reliability.<sup>298</sup> In *Hurd*, the defendant was accused of attacking and stabbing his ex-wife, Jane Sell, while she slept.<sup>299</sup> After the incident, Ms. Sell was either unwilling or unable to describe her assailant.<sup>300</sup> At the prosecutor's suggestion, she visited a psychiatrist and underwent hypnosis in order to enhance her recollection of the incident.<sup>301</sup> Six days later, after some doubts about her identification and considerable encouragement from both the psychiatrist and the investigating detective, she gave a statement to the police identifying the defendant as her assailant.<sup>302</sup>

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<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 1279. Also during 1981, the Maryland Court of Special Appeals overturned its previous decision in *Harding*, noting the concerns expressed in other courts about the dangers of hypnosis and reasoning that Maryland's post-*Harding* adoption of the *Frye* rule compelled the application of *Frye* to hypnotically refreshed testimony. *Polk v. Maryland*, 427 A.2d 1041, 1047-48 (Md. Ct. Spec. App. 1981). The *Polk* court acknowledged that testimony is not itself a scientific procedure, but stated that "[t]he induced recall of the witness . . . cannot be disassociated from the underlying scientific method." *Id.* at 1048.

<sup>296</sup> See *State v. Hurd*, 432 A.2d 86, 95 (N.J. 1981).

<sup>297</sup> *Id.* at 96; see cases cited *infra* notes 330, 333.

<sup>298</sup> *Hurd*, 432 A.2d at 92, 95.

<sup>299</sup> *Id.* at 88.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 89.

Before jury selection, the defendant moved to suppress Ms. Sell's testimony, arguing that hypnosis fails to satisfy the standard for admissibility of scientific evidence under *Frye*.<sup>303</sup> The trial court granted the motion, finding the dangers of fantasy and confabulation during hypnosis sufficient to preclude automatic admissibility of hypnotically refreshed testimony.<sup>304</sup> The prosecutor filed a motion seeking leave to appeal the lower court's orders, which was granted by the state supreme court.<sup>305</sup>

On appeal, the New Jersey Supreme Court held, like the *Mena* and *Mack* courts, that the *Frye* rule applied to hypnotically refreshed testimony.<sup>306</sup> The court analogized hypnosis to the use of a polygraph or a voiceprint, and reasoned that the credibility of a hypnotized witness's recall depends on the reliability of the procedure used to produce that recall.<sup>307</sup> Citing the suggestibility of the hypnotic subject, the danger of confabulation, and the problematic "hardening" of memory that occurs in hypnotic subjects, the court acknowledged significant potential dangers of hypnosis.<sup>308</sup> The court stated, however, that this conclusion did not require a finding that hypnosis is generally accepted as a means of reviving truthful or historically accurate recall in order to admit hypnotically refreshed testimony.<sup>309</sup> The court reasoned that, unlike polygraph tests, hypnosis was not used to obtain truth, but to overcome amnesia and restore the memory of the witness.<sup>310</sup> Thus, a court need only find that hypnosis in a given circumstance will yield recollections as accurate as those of an ordinary witness.<sup>311</sup> Eyewitness memory, the court noted, is generally not overwhelmingly reliable, and cross-examination is not always capable of revealing subtle distortions in the memories of people who have never undergone hypnosis.<sup>312</sup> Based on this reasoning, the court held that a per se inadmissibility rule would be unnecessarily broad and would exclude important evidence that was at least as trustworthy as that of ordinary eyewitnesses.<sup>313</sup>

The *Hurd* court went on to hold that trial courts can admit hypnotically refreshed testimony if the trial court finds that the use of

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<sup>303</sup> *Hurd*, 432 A.2d at 89.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 90.

<sup>306</sup> *Id.* at 91.

<sup>307</sup> *Id.*

<sup>308</sup> *Hurd*, 432 A.2d at 93.

<sup>309</sup> *Id.* at 92.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 95.

<sup>313</sup> *Hurd*, 432 A.2d at 94.

hypnosis under the particular circumstances was reasonably likely to result in recall comparable in accuracy to normal human memory.<sup>314</sup> In reaching this result, the trial court must consider first whether the type of memory loss involved would be likely to yield normal recall if hypnosis were properly employed.<sup>315</sup> If the memory loss was of such a type, the trial court must consider the technique employed and whether it was reasonably reliable.<sup>316</sup> To this end, the *Hurd* court adopted six procedural requirements to aid the trial courts in this determination.<sup>317</sup> These requirements included the qualifications of the hypnotist, the hypnotist's independence from the parties, the keeping of a record of information given to the hypnotist and of all contacts between the hypnotist and the subject, and the absence of other people during the session.<sup>318</sup>

In 1984, in *State v. Iwakiri*, the Idaho Supreme Court held that trial courts may admit hypnotically refreshed testimony only upon a finding, after review of the totality of the circumstances, that the proposed testimony is sufficiently reliable.<sup>319</sup> The *Iwakiri* court declined to adopt the *Hurd* safeguards as absolute requirements, holding instead that those safeguards should be considered by the trial court in its overall determination of reliability.<sup>320</sup> In *Iwakiri*, a witness in a kidnapping trial had undergone hypnosis twice before the trial, at the suggestion of the police.<sup>321</sup> A police officer conducted the first hypnosis session with investigators present, and a psychologist conducted the second.<sup>322</sup>

The *Iwakiri* court began its reasoning with the general rule expressed in the Federal Rules of Evidence and the Idaho Rules of

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<sup>314</sup> *Id.* at 95.

<sup>315</sup> *Id.* at 95-96. The court noted the testimony of an expert witness who indicated that certain types of memory loss, such as that produced by extreme trauma, are more susceptible to recall than others, such as refinement of the details of a subject's existing memory. *Id.*

<sup>316</sup> *Id.* at 96.

<sup>317</sup> *Id.* at 96-97.

<sup>318</sup> *Hurd*, 432 A.2d at 96-97. The exact requirements are: 1) a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session; 2) the professional must be independent of and not regularly employed by the prosecutor, investigator or defense; 3) any information given to the hypnotist by law enforcement personnel prior to the session must be recorded; 4) before inducing hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them; 5) all contacts between the hypnotist and the subject must be recorded; and 6) only the hypnotist and the subject should be present during the session. *Id.*

<sup>319</sup> 682 P.2d 571, 578 (Idaho 1984).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 573.

<sup>322</sup> *Id.*

Evidence that witnesses are presumed competent to testify.<sup>323</sup> Notwithstanding this general rule of competency, the court reasoned that the recognized dangers of hypnosis, in particular the likelihood of suggestion, the danger of confabulation, and the difficulty of "memory hardening" were sufficient to warrant some restriction on hypnotically refreshed testimony.<sup>324</sup> The court did not base its decision on the *Frye* rule, but instead on the general problem of reliability presented by hypnosis.<sup>325</sup> The court reviewed the three basic approaches to such testimony taken by other jurisdictions: the *Harding* rule of per se admissibility, the *Mack* rule of per se inadmissibility, and the *Hurd* rule of admissibility contingent on compliance with procedural safeguards.<sup>326</sup> The court reasoned that all three of these rules were too rigid, and that each addressed one important consideration to the exclusion of all others.<sup>327</sup> For example, the *Hurd* rule, the court stated, itself served as a per se rule because a previously hypnotized witness could testify only if the hypnosis was performed in absolute compliance with the safeguards.<sup>328</sup> The court reasoned that it could foresee circumstances where the witness's testimony would be reliable even if the hypnotist had not followed all of the safeguards.<sup>329</sup> Thus, the *Iwakiri* court held that a trial court must determine the reliability of hypnotically refreshed testimony after applying a totality of the circumstances test, in which guidelines similar to the *Hurd* safeguards should be considered and weighed but should not be dispositive.<sup>330</sup>

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<sup>323</sup> *Id.* at 575.

<sup>324</sup> *Iwakiri*, 682 P.2d at 575-76, 578.

<sup>325</sup> *See id.* at 575-76.

<sup>326</sup> *Id.* at 576-77.

<sup>327</sup> *Id.* at 577.

<sup>328</sup> *Id.* at 577-78.

<sup>329</sup> *Iwakiri*, 682 P.2d at 577.

<sup>330</sup> *See id.* at 578. A number of courts have followed a similar approach to *Iwakiri*, incorporating the *Hurd* safeguards and additional factors, such as the existence of evidence corroborating the proposed testimony, to be considered in a totality of the circumstances test of reliability. *See* *Chamblee v. State*, 527 So. 2d 173, 177 (Ala. Crim. App. 1988) (holding that the trial court must make a case by case determination of whether testimony had a basis independent of the hypnosis); *People v. Romero*, 745 P.2d 1003, 1017 (Colo. 1987) (holding that the trial court must make a determination of reliability considering the totality of the circumstances, including *Hurd* safeguards, the type of memory loss involved and the existence of corroborating evidence); *State v. Johnston*, 529 N.E.2d 898, 906 (Ohio 1988) (holding that the trial court must determine, under the totality of the circumstances, whether testimony was sufficiently reliable to warrant admission, and may consider *Hurd* safeguards); *Zani v. State*, 758 S.W.2d 233, 243-44 (Tex. Crim. App. 1988) (holding that trial court must make an assessment of reliability and should consider *Hurd* safeguards as well as the type of memory loss involved and the existence of corroborating evidence); *State v. Armstrong*, 329 N.W.2d 386, 394 & n.23 (Wis. 1983) (holding that the trial court must review procedure for impermissible suggestiveness and may use *Hurd* safeguards as guidelines).



Since *Hurd*, most jurisdictions have retreated from the *Harding* rule of per se admissibility of hypnotically refreshed testimony.<sup>331</sup> Many have adopted the rationale of *Mena* and *Mack*, finding hypnosis so inherently unreliable that the testimony must be excluded altogether.<sup>332</sup> Others have adopted an approach similar to that of the *Hurd* court, requiring pretrial determinations of reliability before admitting the testimony.<sup>333</sup> A small minority continue to hold the view that such witnesses are competent to testify, and that any question of weight and credibility belongs to the jury as the trier of fact.<sup>334</sup>

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Recently, South Carolina has taken a different approach, rejecting the *Hurd* guidelines and creating its own test for reliability. *State v. Evans*, 450 S.E.2d 47, 51 (S.C. 1994). In *Evans*, the court held that hypnotically refreshed testimony should be evaluated by its consistency with pre-hypnotic statements, the existence of considerable circumstantial evidence corroborating the testimony and the extent to which the witness's responses appear to be automatic. *Id.*

<sup>331</sup> See cases cited *supra* note 330 and *infra* notes 332, 334.

<sup>332</sup> See Kanovitz, *supra* note 42, at 1255 & n.303. For cases holding that *Frye* applies to hypnotically refreshed testimony and that hypnosis is not sufficiently accepted as reliable to warrant admission, see *Contreras v. State*, 718 P.2d 129, 134-36 (Alaska 1986); *People v. Shirley*, 723 P.2d 1354, 1375, 1383-84 (Cal. 1982); *Stokes v. State*, 548 So. 2d 188, 195-96 (Fla. 1989); *People v. Zayas*, 546 N.E.2d 513, 517, 518 (Ill. 1989); *State v. Collins*, 464 A.2d 1028, 1034, 1044 (Md. 1983); *Commonwealth v. Kater*, 447 N.E.2d 1190, 1193, 1195 (Mass. 1983); *People v. Gonzales*, 329 N.W.2d 743, 746, 747-48 (Mich. 1982); *Alsbach v. Bader*, 700 S.W.2d 823, 824, 829 (Mo. 1985); *State v. Peoples*, 319 S.E.2d 177, 187 (N.C. 1984) (using the reasoning of *Frye* and overturning its decision in *State v. McQueen* allowing hypnotically refreshed testimony); *State v. Tuttle*, 780 P.2d 1203, 1210-11 (Utah 1989); *State v. Martin*, 684 P.2d 651, 654 (Wash. 1984). Other courts have held hypnotically refreshed testimony inadmissible without explicit reference to *Frye*. See *State v. Moreno*, 709 P.2d 103, 105 (Haw. 1985) (holding that previously hypnotized witnesses may only testify to matters which can be shown to have been recalled prior to hypnosis); *Strong v. State*, 435 N.E.2d 969, 970 (Ind. 1982) (holding that hypnotically refreshed testimony is inadmissible because it is inherently unreliable and has low probative value); *State v. Haislip*, 701 P.2d 909, 925-26 (Kan. 1985) (holding that hypnotically refreshed testimony is inadmissible because it is unreliable); *State v. Palmer*, 313 N.W.2d 648, 655 (Neb. 1981) (holding that hypnotically refreshed testimony is inadmissible until hypnosis gains scientific acceptance as a reliable means of refreshing memory); *Robison v. State*, 677 P.2d 1080, 1085 (Okla. Crim. App. 1984) (holding that testimony tainted by hypnosis is inadmissible until it gains general acceptance as a method for accurate retrieval of memory); *Commonwealth v. Nazarovitch*, 436 A.2d 170, 178 (Pa. 1981) (holding that hypnotically refreshed testimony is inadmissible until court is presented with more conclusive proof of its reliability).

<sup>333</sup> See cases cited *supra* note 330 (cases incorporating *Hurd* guidelines as part of a totality of the circumstances test of reliability); see also *House v. State*, 445 So. 2d 815, 819, 826-27 (Miss. 1984) (applying *Hurd* standards as prerequisite to admissibility of hypnotically refreshed testimony, with the additional requirement of corroborating testimony or physical evidence); *State v. Beachum*, 643 P.2d 246, 252-53 (N.M. Ct. App. 1981) (declining to apply *Frye* test and adopting *Hurd* standards as prerequisite to admissibility of hypnotically refreshed testimony); *State v. Adams*, 418 N.W.2d 618, 624 (S.D. 1988) (adopting *Hurd* safeguards as prerequisite to admissibility of hypnotically refreshed testimony).

<sup>334</sup> See *State v. Wren*, 425 So. 2d 756, 759 (La. 1983) (holding that hypnotically refreshed testimony is admissible and that issues of credibility can be explored through cross-examination and expert testimony); *State v. Brown*, 337 N.W.2d 138, 151 (N.D. 1983) (holding that hypnotically refreshed testimony is admissible and that issues of credibility can be explored through cross-

### C. *Hypnotically Refreshed Testimony in the Context of Therapy*

Very few of these courts have been faced with the issue of memories recovered during therapeutic hypnosis, as opposed to those recovered through forensic hypnosis undertaken specifically to enhance recollection of a specific, already identified event.<sup>335</sup> Memories recovered during therapeutic hypnosis present a slightly different problem than those recovered or enhanced by forensic hypnosis. Although a prosecutor preparing for litigation can be expected to have knowledge of the procedural requirements for hypnotically refreshed testimony prior to having a witness hypnotized, a person undergoing hypnosis as therapy may have no idea that the issues he or she "remembers" will even come up during hypnosis.<sup>336</sup> Thus, it is problematic to rest the admissibility of such testimony on a series of standards that must be met before and during hypnosis.<sup>337</sup> Furthermore, although hypnosis in a therapeutic context still poses a risk of unreliability, some of the dangers guarded against by procedural safeguards are less likely to be relevant, such as the influence of the prosecutor or the investigating detectives on the process.<sup>338</sup> Although some courts faced with this issue ultimately have allowed the testimony because of factual circumstances indicating reliability, none have abandoned the notion that admissibility requires some preliminary determination of reliability.<sup>339</sup>

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examination and expert testimony); *State v. Glebock*, 616 S.W.2d 897, 903 (Tenn. Crim. App. 1981) (holding that hypnotically refreshed testimony is admissible and fact of hypnosis affects credibility, not admissibility); *Chapman v. State*, 638 P.2d 1280, 1282, 1284 (Wyo. 1982) (holding that hypnotically refreshed testimony is admissible and that an attack on credibility is the proper method to determine the value of the testimony).

<sup>335</sup> See, e.g., *Borawick v. Shay*, 842 F. Supp. 1501, 1505 (D. Conn. 1994), *aff'd*, 68 F.3d 597 (2d Cir. 1995); *McGlaufflin v. State*, 857 P.2d 366, 378 (Alaska Ct. App. 1993); *State v. Varela*, 817 P.2d 731, 732 (N.M. Ct. App. 1991); *West v. Howard*, 601 N.E.2d 528, 532, 533 (Ohio Ct. App. 1991).

<sup>336</sup> See *Varela*, 817 P.2d at 734 (noting that it was significant that a hypnotic subject's revelations were "totally unanticipated" by the hypnotist).

<sup>337</sup> See *id.*

<sup>338</sup> See *id.*

<sup>339</sup> See *Borawick*, 842 F. Supp. at 1505 (holding that testimony refreshed by therapeutic hypnosis must be evaluated according to an abbreviated version of the *Hurd* safeguards, looking at the hypnotist's qualifications, whether the hypnotist added new elements to the subject's description and the existence of a permanent record of the hypnosis); *McGlaufflin*, 857 P.2d at 378 (holding that testimony refreshed during therapeutic hypnosis is admissible if the circumstances of the hypnosis make it likely that the witness's memory has not been enhanced or altered by the hypnosis); *Varela*, 817 P.2d at 732 (holding that strict compliance with procedural safeguards was not required for admissibility of testimony refreshed by therapeutic hypnosis, but that the trial court should determine under all the circumstances whether the use of hypnosis was reasonably likely to result in recall comparable to normal human memory); *West*, 601 N.E.2d at 533 (applying the *Hurd* standards to testimony refreshed by therapeutic hypnosis and holding that the witness's testimony was unreliable and should be barred).

In 1991, the Court of Appeals of Ohio in *West v. Howard* addressed the issue of memories enhanced by therapeutic hypnosis.<sup>340</sup> The *West* court utilized the *Hurd* standards in holding that the testimony refreshed by therapeutic hypnosis was inadmissible.<sup>341</sup> In *West*, the plaintiff had been involved in an automobile accident and could not remember many of the details surrounding the accident.<sup>342</sup> During the course of treatment with a social worker for an unrelated eating disorder, the social worker employed a technique called "self-hypnosis" so that the plaintiff could remember details of the accident in order to deal with the emotions arising from that accident.<sup>343</sup> The rule governing admissibility of hypnotically refreshed evidence in Ohio resembled the *Iwakiri* rule, requiring trial courts to determine whether, under the totality of circumstances, the proposed testimony was sufficiently reliable to merit admission.<sup>344</sup> The *Hurd* safeguards were included within this rule as guidelines for the trial court to follow in making its determination.<sup>345</sup> In addition to these guidelines, the trial courts were to consider other factors that could affect reliability, such as the existence of corroborating evidence, the appropriateness of using hypnosis for the type of memory loss involved, and any motive that the subject might have for remembering or forgetting the events in question.<sup>346</sup>

In applying these standards, the *West* court noted that the plaintiff had no memory at all prior to her self-hypnosis, and that the therapist was fully involved in the memory retrieval process, despite the label "self-hypnosis."<sup>347</sup> The court also noted that the therapist strongly motivated the plaintiff to remember the details, because the therapist told her she needed to do so in order to deal with her emotions about the accident and overcome her eating disorder.<sup>348</sup> Furthermore, the court noted that the therapist was not independent or objective, despite the fact that hypnosis was not employed specifically in anticipation of litigation.<sup>349</sup> In fact, the court stated that the therapeutic nature of the

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<sup>340</sup> 601 N.E.2d at 529.

<sup>341</sup> *Id.* at 533.

<sup>342</sup> *Id.* at 529, 530.

<sup>343</sup> *Id.* at 530. The defendant filed a motion in limine to prevent the plaintiff from testifying to any information recalled during this self-hypnosis, which was granted by the trial court. *Id.* The defendant subsequently filed a motion for summary judgment, which was granted and appealed by the plaintiff. *Id.* at 530-31.

<sup>344</sup> *Id.* at 531-32 (citing *State v. Johnston*, 529 N.E.2d 898 (Ohio 1988)).

<sup>345</sup> *West*, 601 N.E.2d at 532.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 532-33.

<sup>348</sup> *Id.* at 533.

<sup>349</sup> *Id.*

hypnosis was itself troublesome.<sup>350</sup> The court noted that the therapist's sole purpose in initiating the hypnosis was to better the plaintiff's emotional health, and thus was not primarily concerned with the accuracy of the memories.<sup>351</sup> The court implied that the therapist was thus less likely to follow the kinds of procedures that attempt to maximize the accuracy and truth of the memories involved.<sup>352</sup> Finally, the court reasoned that a hypnotic technique where the subject controls the memory retrieval process could never meet the reliability test as applied in Ohio.<sup>353</sup> The guidelines, the court reasoned, require a neutral qualified professional and documentation of the entire process.<sup>354</sup> Thus, the court applied the guidelines as created and held that therapeutic self-hypnosis is inherently unreliable, and as such, inadmissible.<sup>355</sup>

In 1993, in *McGlaufflin v. State*, the Alaska Court of Appeals also was faced with a question of memories refreshed by therapeutic, non-forensic hypnosis.<sup>356</sup> The *McGlaufflin* court held that the hypnotically refreshed testimony in this case was admissible, but that testimony refreshed by therapeutic hypnosis still needed to meet a minimum threshold of reliability.<sup>357</sup> In *McGlaufflin*, the prosecuting witness underwent hypnosis in an effort to control her weight and self-esteem problems.<sup>358</sup> Although the witness's mother suspected that her daughter had been abused in some way, she had no evidence and the abuse was not reported to the authorities until after the witness had been in therapy for three years.<sup>359</sup> The witness apparently did not have trouble remembering the abuse independently before hypnosis, but was reluctant to tell anyone.<sup>360</sup> Her mother informed the hypnotist of her suspicions before the session.<sup>361</sup> During the session, the hypnotist asked the witness if she could see the man who molested her, to which the witness responded, "Yes."<sup>362</sup> When asked if she had anything to say to him, she responded, "No."<sup>363</sup> The witness made no further mention of the mo-

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<sup>350</sup> See *West*, 601 N.E.2d at 533.

<sup>351</sup> *Id.*

<sup>352</sup> See *id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *West*, 601 N.E.2d at 533.

<sup>356</sup> 857 P.2d 366, 369 (Alaska Ct. App. 1993).

<sup>357</sup> *Id.* at 376, 380.

<sup>358</sup> *Id.* at 369, 373.

<sup>359</sup> *Id.* at 372-73.

<sup>360</sup> *Id.* at 373.

<sup>361</sup> *McGlaufflin*, 857 P.2d at 373.

<sup>362</sup> *Id.* at 374.

<sup>363</sup> *Id.*

lestation during the session.<sup>364</sup> At trial, the defendant sought to suppress all of the witness's testimony about the abuse because her memory had been tainted by the prior hypnosis.<sup>365</sup>

Alaska's rule governing the admissibility of hypnotically refreshed testimony at this time more closely resembled the *Mena* and *Mack* rules than the *Hurd* rule in that it barred all hypnotically adduced testimony.<sup>366</sup> The court in *McGlaulin* declined to make a complete exception for therapeutic hypnosis, reasoning that hypnosis performed for nonforensic purposes may also result in altered memory.<sup>367</sup> The court did, however, hold that the exclusion of hypnotically refreshed testimony applies only when the circumstances and the results of the hypnosis demonstrate a likelihood that the hypnotized witness's memories have been enhanced or altered.<sup>368</sup> In reconciling this holding with the previous rule of complete exclusion, the court reasoned that whenever a witness has been hypnotized for forensic purposes, such circumstances always exist, thus eliminating the need for a determination by the trial court.<sup>369</sup> In this case, however, the circumstances surrounding the witness's hypnosis did not raise a presumption that her memory had been enhanced or altered by hypnosis.<sup>370</sup> She had never forgotten her abuse, she had been hypnotized once in order to address a separate issue, and the only mention of sexual abuse during the session were two questions that yielded no real information.<sup>371</sup> Thus, the court held that the prosecuting witness was properly allowed to testify.<sup>372</sup>

Since 1980, a significant majority of jurisdictions have found hypnosis unreliable as a means of retrieving memory and have required either a bar on the testimony of a previously hypnotized witness or a preliminary determination of reliability before admitting such testimony.<sup>373</sup> Thus far, this premise has not been changed by arguments that therapeutic hypnosis is less suggestive and more reliable than forensic hypnosis, although courts in some instances have allowed the testimony because the particular circumstances indicated reliability.<sup>374</sup>

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<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 369.

<sup>366</sup> See *McGlaulin*, 857 P.2d at 369, 371 (citing *Contreras v. State*, 718 P.2d 129 (Alaska 1986)).

<sup>367</sup> *Id.* at 375, 376.

<sup>368</sup> *Id.* at 378.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 379.

<sup>371</sup> *McGlaulin*, 857 P.2d at 374, 380.

<sup>372</sup> *Id.* at 379, 380.

<sup>373</sup> See cases cited *supra* notes 330, 332, 333.

<sup>374</sup> *Borawick v. Shay*, 842 F. Supp. 1501, 1505 (D. Conn. 1994), *aff'd*, 68 F.3d 597 (2d Cir.

#### IV. MEMORIES RECOVERED THROUGH THERAPY: THREE ALTERNATIVES

To the extent that a memory is recovered as a result of therapeutic hypnosis, the admissibility of testimony about the contents of that memory should be governed by the existing rules governing hypnotically refreshed testimony.<sup>375</sup> If confronted with a challenge to the testimony of a witness who recovered memories of sexual abuse during therapy but without the use of hypnosis, courts could take one of three approaches based on the current treatment of hypnotically refreshed testimony.<sup>376</sup> First, a court could consider the witness competent to testify, and rely on cross-examination and expert testimony to test the accuracy of the memory, as a minority of courts continue to do with hypnotically refreshed testimony.<sup>377</sup> Although this approach is consistent with the general rule that witnesses are presumed competent and would allow the trier of fact to consider relevant evidence, it does not address the very real danger that the memories are the product of suggestion and inaccurate or wholly erroneous.

Second, a court could consider therapy as an intervening process that has not been accepted as a reliable means of retrieving accurate memories and conclude that testimony about memories retrieved during therapy is not admissible at all.<sup>378</sup> Although this approach would protect a defendant from a conviction or liability based only on unreliable evidence, it also carries some serious problems. Therapy, while it may be suggestive, does not involve the altered state of consciousness that hypnosis does, and thus memories recovered during therapy might be closer to "normal" memories than those recovered under hypnosis. Because testimony about normal memories is liberally admitted in spite of its frequent unreliability, courts may be unwilling to take the drastic step of excluding eyewitness testimony just because it has been subject to some degree of influence or suggestion. Finally, courts are unlikely to adopt a rule of evidence that would, in effect, nullify recent expansions in statutes of limitations designed to allow access to the courts for adult survivors of sexual abuse.

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1995); *McGlaulin*, 857 P.2d at 369; *State v. Varela*, 817 P.2d 731, 732 (N.M. Ct. App. 1991); *West v. Howard*, 601 N.E.2d 528, 533 (Ohio Ct. App. 1991).

<sup>375</sup> See *Borawick*, 842 F. Supp. at 1505; *McGlaulin*, 857 P.2d at 369; *Varela*, 817 P.2d at 731; *West*, 601 N.E.2d at 533.

<sup>376</sup> See cases cited *supra* notes 330, 332-34.

<sup>377</sup> See cases cited *supra* note 334.

<sup>378</sup> See cases cited *supra* note 332.

Third, a court could consider memories recovered during therapy potentially but not consistently reliable, and require a pretrial determination of reliability before admission of the testimony.<sup>379</sup> Although such determinations would involve additional litigation and expense to the parties, this approach seems to strike an appropriate balance between the need to admit all relevant and reliable evidence and the need to protect both civil and criminal defendants from liability or conviction based on unreliable or untrue evidence.

#### A. *Recovered Memory Testimony as per se Admissible*

The first approach to a challenge to recovered memory testimony would be to presume the witness competent and rely on cross-examination and expert testimony about repression to test the credibility of the witness's memory.<sup>380</sup> Both tradition and the Federal Rules of Evidence favor this approach.<sup>381</sup> In most instances a witness is presumed competent to testify, and the test for determining competency when challenged is minimal.<sup>382</sup> Courts often allow very young children to testify, as well as people of limited intelligence and biased and self-interested witnesses whose information may not be very reliable.<sup>383</sup> Courts have long understood the foibles and inaccuracies of normal (nonrepressed) memory, and have accepted the premise that testimony need not be infallible to be competent.<sup>384</sup>

If recovered memory is seen as simply another gradation of normal, fallible human memory, there may be little justification for excluding testimony based on that memory.<sup>385</sup> The liberal rules of competency reflected in the Federal Rules of Evidence reflect a general

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<sup>379</sup> See cases cited *supra* notes 330, 333.

<sup>380</sup> See *State v. Brown*, 337 N.W.2d 138, 138 (N.D. 1983); *Chapman v. State*, 638 P.2d 1280, 1282, 1283 (Wyo. 1982).

<sup>381</sup> See FED. R. EVID. 601. Rule 601 provides:

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

*Id.*; see also FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."); *Brown*, 337 N.W.2d at 151; *Chapman*, 638 P.2d at 1284.

<sup>382</sup> See *Brown*, 337 N.W.2d at 151; *Chapman*, 638 P.2d at 1284.

<sup>383</sup> See FED. R. EVID. 601 advisory committee's note ("A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility . . .").

<sup>384</sup> See *id.*; *Brown*, 337 N.W.2d at 151.

<sup>385</sup> See *Brown*, 337 N.W.2d at 151; *Chapman*, 638 P.2d at 1284.

policy favoring inclusion of relevant evidence.<sup>386</sup> The treatment of previously hypnotized witnesses may be a rare exception to this rule, based upon specific and well established concerns about their reliability.<sup>387</sup> Unlike hypnosis, the flaws associated with the retrieval of repressed memories are the same flaws associated with the retrieval and articulation of nonrepressed memory. Although the individual may be subject to suggestion by his or her therapist, all witnesses are subject to suggestion by friends, family, lawyers, the media and other outside influences.<sup>388</sup> A person might be encouraged by the expressed goals or expectations of the therapist to confabulate, or fill in gaps in his or her story, but any witness might feel pressure from any number of sources to produce a coherent story.<sup>389</sup> Finally, if repressed memory is simply a variation on normal memory, there is no reason to believe that an individual is any more likely to become convinced of the veracity of his or her story through the process of retrieving a long-buried memory than a witness with nonrepressed memories who thinks he or she remembers things a certain way and becomes convinced that the memory is correct.<sup>390</sup>

Furthermore, it can be argued that any restriction on the testimony of recovered memory witnesses would effectively block legal action against perpetrators, rewarding child abusers and making a nullity out of the recent expansions in statutes of limitations.<sup>391</sup> Judicial and legislative expansions of those statutes were made in response to the fact that adult survivors of incest were effectively blocked from seeking any legal redress from their abusers.<sup>392</sup> To exclude these victims from testifying would recreate the precise problem that those changes were designed to remedy.<sup>393</sup>

Finally, unlike the generally accepted view of hypnosis, experts in the psychological community do not agree that recovered memory is unreliable.<sup>394</sup> In the late 1970s and early 1980s, courts were faced with overwhelming evidence indicating that hypnosis was fraught with dangers, including studies that showed subjects purporting to "recall"

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<sup>386</sup> See FED. R. EVID. 601 advisory committee's note.

<sup>387</sup> See *State v. Mack*, 292 N.W.2d 764, 768-69 (reaching its decision in part based on exhaustive expert testimony and extensive amicus briefs on the dangers of hypnosis).

<sup>388</sup> *Brown*, 337 N.W.2d at 151; Olio, *supra* note 180, at 442.

<sup>389</sup> See *Brown*, 337 N.W.2d at 151.

<sup>390</sup> See Olio, *supra* note 180, at 442.

<sup>391</sup> See Ernsdorff & Loftus, *supra* note 38, at 144, for discussion of the reasoning behind the changes in statutes of limitations.

<sup>392</sup> See *id.*

<sup>393</sup> See *id.*

<sup>394</sup> See *id.* at 162; Schooler, *supra* note 102, at 453.



events that were supposed to occur ten years in the future.<sup>395</sup> In the case of recovered memory, a large body of professionals are convinced of the accuracy of the memories, and no conclusive studies have contradicted them.<sup>396</sup> Instead, there are competing theories supported by anecdotal evidence and experimental studies that prove nothing more than that recovered memories are no less fallible than normal memories.<sup>397</sup> Thus, the compelling evidence that led most courts to make an exception for hypnosis to the otherwise liberal rules of competency may not exist in the case of recovered memories.

### B. *Recovered Memory Testimony as per se Inadmissible*

The second approach, at the opposite end of the spectrum, would hold that recovered memories are inherently unreliable and should be inadmissible.<sup>398</sup> This approach finds some support in the reasoning of many of the hypnosis cases, but only if the process of recovering a memory through therapy is seen as an intervening science that must be evaluated for its reliability and general acceptance.<sup>399</sup> Once therapy begins to interfere with the witness's normal memory functioning, the results may carry the same dangers as hypnosis, and the controversy within the mental health profession shows a distinct lack of general acceptance of the reliability of those results.<sup>400</sup>

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<sup>395</sup> See *People v. Shirley*, 723 P.2d 1354, 1379 (Cal. 1982) (citing studies in which subjects underwent age "progression," where they were made to believe they were living ten years in the future, and reported their future "memories" with as much conviction as past memories).

<sup>396</sup> See LOFTUS & KETCHAM, *supra* note 3, at 209; TERR, *supra* note 81, at 15, 40; Schooler, *supra* note 102, at 456.

<sup>397</sup> See Olio, *supra* note 180, at 442.

<sup>398</sup> See Ernsdorff & Loftus, *supra* note 38, at 162.

<sup>399</sup> See *Contreras v. State*, 718 P.2d 129, 134 (Alaska 1986) (reasoning that the testimony of previously hypnotized witnesses could not be "logically disassociated from the underlying technique"). Recently, a trial court judge in New Hampshire ordered a hearing on the scientific validity of recovered memory therapy, analogizing to the law concerning hypnotically refreshed testimony and reasoning that, like hypnosis, memories recovered during therapy cannot be logically disassociated from the underlying technique. *State v. Hungerford*, No. 94-S-045, slip op. at 4-5 (Hillsborough County Super. Ct. Apr. 4, 1995). After a two-week hearing, the judge ruled that the testimony of the victims could not be admitted because the theory of repressed and recovered memory was not scientifically reliable. *Id.* at 22-24. *But see* Hoult v. Hoult, 57 F.3d 1, 5 (1st Cir. 1995). There, the court upheld a verdict based largely upon a recovered memory. *Id.* at 5. The defendant argued on appeal that the admission of the expert's testimony without a finding that the theories underlying her opinions were reliable constituted a "mistake" under Rule 60(b) of the Federal Rules of Civil Procedure, and thus grounds for relief from the judgment. *Id.* at 3-4. The court held that the admission of her testimony was not a mistake as defined in Rule 60(b), and that the trial court was not required to make explicit rulings regarding expert testimony in the absence of an objection. *Id.* at 5. The reliability of Jennifer's testimony was not challenged. See *id.*

<sup>400</sup> See *id.*; Ernsdorff & Loftus, *supra* note 38, at 162.

The courts that have held hypnotically refreshed testimony inadmissible because it fails to meet the *Frye* test of general scientific acceptance have reasoned that hypnosis is a technique specifically designed to affect the memory process.<sup>401</sup> Thus, the testimony of a previously hypnotized witness is not merely that of a first hand memory, but is at least in part the result of a scientific process.<sup>402</sup> The testimony therefore lives or dies according to the validity of that process. The testimony of these witnesses, courts have held, "cannot be disassociated from the underlying technique."<sup>403</sup>

Similarly, therapeutic techniques employed to access hidden memories can be seen as a process specifically designed to affect the memory process.<sup>404</sup> This kind of therapy rests on the premise that true emotional healing cannot occur until the patient has exhumed and confronted his or her painful memories.<sup>405</sup> Thus, the techniques employed and the kinds of questions asked are intended to influence the patient's memory, just as hypnosis is designed to influence the subject's memory.<sup>406</sup> In this respect, it can be argued that the testimony of a witness whose memory has been affected by such techniques must also live or die according to the validity of those techniques and cannot be logically disassociated from them.<sup>407</sup>

The therapeutic techniques found in the self-help literature and in the recommendations of practicing therapists carry dangers similar to hypnosis.<sup>408</sup> In the first case, the techniques pose a danger of suggestibility.<sup>409</sup> From the time a therapist first asks the direct question, or indicates that the patient's symptoms might be explained by childhood sexual abuse, the patient is on notice that this is an acceptable, even encouraged, explanation for his or her emotional problems.<sup>410</sup> If the therapist employs imagistic work, journal writing or art therapy, there is much room for suggestion in the choice of the image or idea that serves as a "focal point" for these techniques.<sup>411</sup> If a therapist believes

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<sup>401</sup> See *People v. Shirley*, 723 P.2d 1354, 1375 (Cal. 1982).

<sup>402</sup> See *id.*

<sup>403</sup> *Id.*; see also *Contreras*, 718 P.2d at 134.

<sup>404</sup> See *Shirley*, 723 P.2d at 1375.

<sup>405</sup> Loftus, *supra* note 1, at 530.

<sup>406</sup> See *Shirley*, 723 P.2d at 1375; Loftus, *supra* note 1, at 530.

<sup>407</sup> See *Shirley*, 723 P.2d at 1375; Loftus, *supra* note 1, at 530.

<sup>408</sup> See *supra* notes 64-78 and accompanying text for discussion of common therapeutic techniques.

<sup>409</sup> See LOFTUS & KETCHAM, *supra* note 3, at 141; Ernsdorff & Loftus, *supra* note 38, at 158.

<sup>410</sup> See Loftus, *supra* note 1, at 526-27.

<sup>411</sup> See LOFTUS & KETCHAM, *supra* note 3, at 160-61. See *supra* notes 64-78 and accompanying text for explanation of the techniques which involve the use of a "focal point."

that the patient's symptoms indicate sexual abuse, it is possible or even probable that he or she will encourage the patient to select a focal point that would help lead the patient to such a conclusion.<sup>412</sup> Each of these techniques involves an interpretation stage, where the therapist and the patient work together to decipher the meaning of what the patient has envisioned, written or drawn.<sup>413</sup> If the therapist employs dream work, a similar interpretation stage is involved.<sup>414</sup> Again, given that the therapist believes sexual abuse to be implicated by the patient's symptoms, there is much room for suggestion and leading in these interpretation stages.<sup>415</sup>

Finally, the widespread use of group therapy involves a high degree of suggestion.<sup>416</sup> Patients are placed in an environment in which all of their peers either have recovered, or are in the process of recovering, long-buried memories of sexual abuse.<sup>417</sup> Coupled with the initial, and perhaps ongoing, message from the therapists that sexual abuse is an acceptable explanation for their problems, the group therapy environment could strongly influence the patients to believe they have hidden memories of abuse.<sup>418</sup> Contributing to the danger of suggestion is the fact that the patients themselves are both emotionally vulnerable because of the problems that led them to therapy in the first place and eager for an explanation for those troubles.<sup>419</sup> They are not in a trance, as hypnosis subjects are, but their emotional state and their trust in their therapists might make them more vulnerable to suggestion than a psychologically healthy person would be.

Secondly, these therapeutic techniques present a danger of confabulation similar to, if not as intense as, that presented by hypnosis. Again, the patient is admittedly not in a trance and therefore has somewhat more power to resist the urge to confabulate than a subject in hypnosis. Nevertheless, the patient is in an emotionally vulnerable state and may be inclined to try to please the therapist.<sup>420</sup> The content of what a patient says to a therapist is influenced by transference, because the patient is searching for certain kinds of responses from

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<sup>412</sup> See LOFTUS & KETCHAM, *supra* note 3, at 160-61.

<sup>413</sup> *Id.* at 156-62.

<sup>414</sup> *Id.* at 159.

<sup>415</sup> See *id.*

<sup>416</sup> See *id.* at 170-71; Loftus, *supra* note 1, at 527.

<sup>417</sup> LOFTUS & KETCHAM, *supra* note 3, at 170-71; Loftus, *supra* note 1, at 527.

<sup>418</sup> See LOFTUS & KETCHAM, *supra* note 3, at 170-71; Loftus, *supra* note 1, at 527.

<sup>419</sup> See Kanovitz, *supra* note 42, at 1249; Loftus, *supra* note 1, at 525; McNamee, *supra* note 139, at 1.

<sup>420</sup> See Kanovitz, *supra* note 42, at 1248-49; Loftus, *supra* note 1, at 526; Reich, *supra* note 46, at 33.

the therapist, depending on who or what the therapist is supposed to represent.<sup>421</sup> If the patient has received the message that sexual abuse is an explanation the therapist will accept, he or she may feel a strong pull to "fill in the gaps," as in hypnosis, to create a more coherent story.<sup>422</sup> For example, if a patient has a genuine memory of a particularly painful conflict with her parents, it may not be beyond the bounds of possibility for her to convince herself that she remembers a physical aspect to that episode. The techniques of imagistic work, journal writing and art therapy create room for the patient to conjure up the kinds of details that would make such a coherent story; the dream work and the interpretation stages of the other techniques offer a similar opportunity for the patient to fill in gaps in the story with the appropriate reading of dream symbols, images and words.<sup>423</sup>

These therapeutic techniques also carry some danger of memory hardening. In hypnosis, the danger is that a memory retrieved in a trance will later take the form of a hard and fast truth in the subject's mind, making it impossible to cross-examine the subject or test his or her integrity.<sup>424</sup> He or she believes the memory to be true, and so will exhibit all the confidence and certainty of a person telling the truth, even if the story is patently false.<sup>425</sup> In therapy, if the design is to access a hidden memory and help the patient confront it, the patient's memories will be validated and encouraged at each step.<sup>426</sup> Because the goal of therapy is to heal rather than to investigate, the therapist's primary responsibility is to help the patient confront his or her experiences or perceptions of those experiences.<sup>427</sup> The therapist is therefore unlikely to question the veracity of each image the patient retrieves, or to inform the patient that his or her painstakingly recovered memories may not represent the historical truth.<sup>428</sup> Furthermore, during this process, many therapists encourage patients to avoid contact with family members who do not acknowledge their memories because those people are in denial and might try to dissuade the patient from the conclusions he or she is reaching.<sup>429</sup> After undergoing a process that

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<sup>421</sup> SPENCE, *supra* note 61, at 95.

<sup>422</sup> See *id.*

<sup>423</sup> See Loftus, *supra* note 1, at 526-27.

<sup>424</sup> See *Contreras v. State*, 718 P.2d 129, 133 (Alaska 1986); *State v. Mack*, 292 N.W.2d 764, 769 (Minn. 1980).

<sup>425</sup> See *Contreras*, 718 P.2d at 133; *Mack*, 292 N.W.2d at 769.

<sup>426</sup> See Loftus, *supra* note 1, at 530.

<sup>427</sup> See *West v. Howard*, 601 N.E.2d 528, 533 (Ohio Ct. App. 1991); Loftus, *supra* note 1, at 530.

<sup>428</sup> See *West*, 601 N.E.2d at 533; Loftus, *supra* note 1, at 530.

<sup>429</sup> See *Frontline: Divided Memories* (PBS television broadcast, Apr. 11, 1995) (discussing

continually encourages and validates each glimpse of memory, in almost total isolation from people who might challenge or question those memories, the patient can be expected to have an increased confidence in the veracity of those memories even if they are not true. Thus, the recovered memory witness, like the previously hypnotized witness, may be difficult or impossible to cross-examine effectively.

Finally, expert testimony about the nature of recovered memory may not be capable of informing a jury about how to evaluate the recovered memory testimony.<sup>430</sup> The professional community is so split over this issue and so lacking in definitive scientific answers that juries often are presented with conflicting hypotheses and no acceptable means of distinguishing them.<sup>431</sup> This is the kind of problem that *Frye* and similar cases were intended to protect against.<sup>432</sup> Where a jury's ability to evaluate testimony depends on its understanding of the scientific underpinnings of that testimony, it must be protected against misplaced reliance on unproven or unsound scientific principles.<sup>433</sup>

If the *Frye* test is applied to recovered memory, recovered memory should fail. Although a segment of the relevant professional community certainly believes in the accuracy and validity of recovered memories, the controversy about this issue precludes a conclusion that it is a generally accepted theory.<sup>434</sup> The American Psychological Association's panel has not yet come up with a conclusive answer, indicating instead that both repressed memory and false memory are possible.<sup>435</sup> The research on each side of the debate merely indicates that each phenomenon is possible, but does not disprove the other.<sup>436</sup> With the professional community still at this impasse, no general acceptance of either theory exists sufficient to meet the standards of *Frye*.

Even under the revised test for admissibility of scientific evidence in the Federal Rules of Evidence, as interpreted by the Supreme Court

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treatment center that advocates "detachment" of its clients from families of origin as a necessary component of therapy); see also LORTUS & KETCHAM, *supra* note 3, at 184-85 (telling the story of a father accused by his adult daughter, who received a letter confronting him with the recovered memory and informing him that, at the suggestion of her therapist, she was severing all ties with him. She also stopped speaking to her older sister because her sister did not believe in the memories and was considered harmful to the complaining daughter's treatment).

<sup>430</sup> Barall, *supra* note 2, at 1486.

<sup>431</sup> See *id.*

<sup>432</sup> See *Contreras v. State*, 718 P.2d 129, 135 (Alaska 1986) (noting that the purpose of the *Frye* rule was to ensure that juries would not be misled by "unproven, unsound scientific procedures").

<sup>433</sup> See *id.*; Barall, *supra* note 2, at 1486.

<sup>434</sup> See Schooler, *supra* note 102, at 452.

<sup>435</sup> *When Memories Collide*, *supra* note 46, at B33.

<sup>436</sup> See *id.*

in *Daubert*, testimony about a memory recovered through therapy might likewise fail.<sup>437</sup> The theory of repressed memory, at least to the extent that it involves the accuracy or reliability of recovered memories, is not yet capable of being objectively tested.<sup>438</sup> Although the theories on both sides of the debate have been published and subjected to peer review, the psychological community remains split over the issue.<sup>439</sup> The error rate, or the extent to which recovered memories represent something that is wholly or partially false, is not known.<sup>440</sup> According to memory researchers, however, that error rate may be significant.<sup>441</sup> Finally, even under *Daubert*, widespread acceptance in a relevant scientific community is a factor to consider in the admissibility of scientific evidence.<sup>442</sup> Because the psychological community remains so deeply divided over this issue, the reliability of recovered memories cannot be said to have gained widespread acceptance.<sup>443</sup>

Although the logic of applying *Frye* or *Daubert* to recovered memory testimony might be compelling, courts are unlikely to take such an approach. Therapy does not involve the altered state of consciousness that hypnosis does, and a patient may be more able to defend against suggestion and inclinations to confabulate. Thus, although similar dangers of suggestion, confabulation and memory hardening may exist with memories recovered through therapy, the dangers may not be as extreme, and the memories recovered might be closer to "normal" memories than those recovered under hypnosis. The barring of hypnotically refreshed testimony is a rare exception to an otherwise liberal presumption of competency.<sup>444</sup> If the dangers associated with memories recovered through therapy are not as severe as those associated with memories recovered through hypnosis and more closely approximate the dangers associated with "normal" memory, they may not be sufficient to justify such a complete exception to the rule.

Finally, adoption of a per se inadmissibility rule would effectively undo recent, widespread changes in the law that allow victims of childhood sexual abuse to bring suit. Because the events at issue in

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<sup>437</sup> See *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2796-97 (1993) (describing test for admissibility of scientific evidence under the Federal Rules of Evidence).

<sup>438</sup> See *Daubert*, 113 S. Ct. at 2796; see *supra* notes 217-26 and accompanying text for discussion of difficulties with studying reliability of recovered memories.

<sup>439</sup> See *Daubert*, 113 S. Ct. at 2797; *When Memories Collide*, *supra* note 46, at B33.

<sup>440</sup> See *Daubert*, 113 S. Ct. at 2797; *When Memories Collide*, *supra* note 46, at B33.

<sup>441</sup> See Ernsdorff & Loftus, *supra* note 38, at 155.

<sup>442</sup> *Daubert*, 113 S. Ct. at 2797.

<sup>443</sup> See *id.*; *When Memories Collide*, *supra* note 46, at B33.

<sup>444</sup> See *State v. Iwakiri*, 682 P.2d 571, 575 (Idaho 1984); see also FED. R. EVID. 601 & advisory committee's note.

suits or prosecutions brought on the strength of recovered memories are often decades old, little other evidence besides the recovered memory testimony is likely to be available. Thus, prohibiting the testimony in all circumstances would have the same effect as applying a short statute of limitations. Over the past few years, twenty-three states were sufficiently moved by the plight of adult survivors of childhood sexual abuse who were barred from seeking legal redress to apply the discovery rule to recovered memories.<sup>445</sup> At least with respect to these jurisdictions, courts are unlikely to adopt a rule of evidence that would recreate the precise problem the legislatures had sought to address.

### C. *Recovered Memory Testimony as Conditionally Admissible*

The third approach would be to find that recovered memories are potentially but not consistently reliable and should be subject to a pretrial determination of reliability based on the facts and circumstances surrounding the recovery of the memory.<sup>446</sup> Some of the courts that have adopted this approach to hypnotically refreshed testimony have done so under the auspices of *Frye*, while others have rested their conclusions simply on the question of reliability.<sup>447</sup> Thus, it is not necessary to find that recovered memory therapy is a scientific technique subject to the *Frye* test in order to take this third approach.<sup>448</sup>

Authority for this kind of approach, assuming that the *Frye* rule is not applicable to recovered memory therapy, lies in the power of judges to bar evidence when its prejudicial effect substantially outweighs its probative value.<sup>449</sup> The probative value of recovered memory testimony in general, and a given witness's testimony in particular, is low because of the possibility of suggestion and confabulation, and

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<sup>445</sup> See, e.g., *Johnson v. Johnson*, 701 F. Supp. 1363, 1370 (N.D. Ill. 1988) (applying Illinois law and holding that the statute of limitations should be tolled for plaintiffs who repressed memories of sexual abuse); *Mary D. v. John D.*, 264 Cal. Rptr. 633, 638-39 (Ct. App. 1989) (applying discovery rule to plaintiff who can show that memory of abuse was repressed).

<sup>446</sup> See *Iwakiri*, 682 P.2d at 578 (holding that trial courts must hold a pretrial determination of the reliability of hypnotically refreshed testimony, to be determined by the totality of the circumstances rather than rigid adherence to procedural safeguards); *State v. Hurd*, 432 A.2d 86, 95, 96 (N.J. 1981) (holding that hypnotically refreshed memories may be admitted only if procedural safeguards are followed to ensure reliability).

<sup>447</sup> Compare *Hurd*, 432 A.2d at 91 (explicitly applying *Frye* to hypnotically refreshed testimony) with *Iwakiri*, 682 P.2d at 575-76 (reaching its holding without explicit reference to *Frye*).

<sup>448</sup> See *Iwakiri*, 682 P.2d at 575-76, 578.

<sup>449</sup> See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

because of the uncertainty in the mental health profession about the veracity of recovered memories.<sup>450</sup> The prejudicial effect, on the other hand, might be high. The mere accusation of sexual abuse is devastating, and could prejudice the jury against a defendant even before any evidence is offered. In the case of recovered memory, cases are brought years, even decades, after the alleged event occurred, frequently leaving the recovered memory witness's testimony as the only "hard" evidence available.<sup>451</sup> Finally, the sentiment expressed by clinical psychologists about their patients' memories may be common among jurors as well: the idea that nobody would invent such a horrible story in the absence of some truth.<sup>452</sup> Thus, without some case by case determination of the reliability of the witness's memory, the civil or criminal defendant might be unfairly prejudiced.

Furthermore, reliance on an individual determination of reliability would prevent the kinds of injustices that might occur with either absolute admissibility or absolute inadmissibility. If a witness can establish that her testimony is reliable, she will not be blocked from seeking legal redress from her abuser.<sup>453</sup> Such an approach also protects defendants from claims that are likely to be unreliable. If a pretrial screening process excludes the most dubious testimony, many innocent defendants might be spared the expense and humiliation of defending against a claim of sexual abuse in court.<sup>454</sup> Finally, exclusion of testimony because of undue suggestions might encourage therapists to be more circumspect in their treatment and diagnoses, reducing the number of patients who are misdiagnosed.

All of the particular safeguards used by the *Hurd* court and incorporated to some degree in the *Iwakiri* decision may not be appropriate to the question of recovered memory, but the idea of a pretrial determination of reliability with some comparable guidelines could prove useful. Many of the *Hurd* safeguards were created to address problems associated with the use of forensic hypnosis.<sup>455</sup> In forensic hypnosis, a witness to a crime is hypnotized, often at the encouragement of the

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<sup>450</sup> See *Iwakiri*, 682 P.2d at 575-76 (discussing the dangers of suggestion and confabulation in hypnosis as reasons that it is too unreliable to be unconditionally admissible); SPENCE, *supra* note 61, at 95 (discussing transference and how it can influence what a patient believes and reveals to her therapist); Ernsdorff & Loftus, *supra* note 38, at 158 (discussing the dangers of suggestion in therapy); Schooler, *supra* note 102, at 452 (discussing the polarization of the mental health community over the reliability of recovered memories).

<sup>451</sup> See Ernsdorff & Loftus, *supra* note 38, at 167.

<sup>452</sup> See LOFTUS & KETCHAM, *supra* note 3, at 209.

<sup>453</sup> See *supra* notes 387-89 and accompanying text.

<sup>454</sup> See *supra* notes 236-38 and accompanying text.

<sup>455</sup> See *State v. Hurd*, 432 A.2d 86, 88-89, 95 (N.J. 1981).



police or prosecutor, in order to sharpen his or her memory of the crime. Many of the safeguards address the particular problem of influence and suggestion by law enforcement or by a hypnotist who has been apprised of the case and of what the police or prosecutor wants to see the witness remember.<sup>456</sup> Thus, those safeguards particular to issues raised in the context of law enforcement are of limited utility in the context of therapy.<sup>457</sup> For example, the requirement that the hypnotist be independent from law enforcement or the defense and the requirement that all information given to the hypnotist by the police be recorded are not useful because they are specific to the dangers associated with forensic hypnosis and law enforcement's involvement in the process.

The other *Hurd* standards as well as additional factors used by other jurisdictions that partially incorporate *Hurd* are useful.<sup>458</sup> In particular, the requirement that the person conducting the hypnosis must be properly qualified, the requirement that all information remembered by the subject before hypnosis be recorded, the requirement that the session itself be recorded, and the consideration of both the type of memory loss involved and the existence of corroborating evidence all have some application to an evaluation of the reliability of a particular recovered memory.<sup>459</sup> Unlike the standards that directly confront problems with the involvement of law enforcement in the hypnotic process, these considerations shed light on the level of suggestion involved in any memory enhancing procedure.

An examination of the therapist's qualifications is an important factor in evaluating the reliability of a memory retrieved through therapy. One of the criticisms launched at the recovered memory movement is that many of the therapists involved are inadequately trained and have a poor understanding of the workings of memory.<sup>460</sup> The level of expertise of a particular therapist could influence the degree to which the patient had been exposed to improper suggestion, or informed of a possible diagnosis of sexual abuse that did not have a real basis.<sup>461</sup> In addition, the type of expertise that a therapist pos-

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<sup>456</sup> See *supra* note 318 and accompanying text for a list of the safeguards.

<sup>457</sup> But see *West v. Howard*, 601 N.E.2d 528, 533 (Ohio Ct. App. 1991) (applying all of the *Hurd* safeguards to the issue of therapeutic hypnosis and finding that the witness's testimony was not reliable because the safeguards were not followed).

<sup>458</sup> See *supra* notes 314-18 and accompanying text.

<sup>459</sup> See *id.*; *Zani v. State*, 758 S.W.2d 233, 243 (Tex. Crim. App. 1988).

<sup>460</sup> See Reich, *supra* note 46, at 35.

<sup>461</sup> See Kevin R. Byrd, *The Narrative Reconstructions of Incest Survivors*, 49 AM. PSYCHOL. 439, 439 (1994).

esses might also cast some light on the likelihood that the recovered memory is either an independent memory or the product of suggestion.<sup>462</sup> If a therapist specializes in counseling victims of childhood sexual abuse, the patients who see that therapist and understand the nature of his or her practice might expect from the beginning to recover memories of abuse.<sup>463</sup> Thus, the presence of a certain expertise could itself cast doubt on the independence of the resulting memories.<sup>464</sup>

Similarly, consideration of what the patient remembered before undergoing therapy and access to the contents of the therapy could prove very useful in evaluating whether the memory had an independent basis or was the product of suggestion.<sup>465</sup> With some documentation of the patient's pretherapy memories, a court could more easily determine whether the proposed testimony was consistent with those memories. If the content of the therapeutic techniques were available to the court, the presence or absence of improper suggestion could be evaluated in real, rather than speculative terms.<sup>466</sup> Even if a complete transcript of the therapy were unavailable, information about which techniques were used could help in determining reliability. For example, group therapy is more suggestive than imagistic work, art therapy or journal writing, and some techniques may not be significantly suggestive at all.<sup>467</sup>

Understanding the type of memory loss involved also can have some bearing on the credibility of the testimony.<sup>468</sup> For example, a recovered memory of an event that occurred before the witness's second year might be more dubious than one of a later event because of the evidence that the human brain is not sufficiently developed to

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<sup>462</sup> See *TERR*, *supra* note 81, at 160–61.

<sup>463</sup> *Id.*

<sup>464</sup> See *id.*

<sup>465</sup> See *State v. Iwakiri*, 682 P.2d 571, 578 (Idaho 1984); *State v. Hurd*, 432 A.2d 86, 96 (N.J. 1981).

<sup>466</sup> See *Loftus*, *supra* note 1, at 529 (discussing the experience of an investigator hired to record sessions with a therapist suspected of encouraging false memories in her patients). There might be significant controversy in expecting therapists to record confidential sessions with their patients. These are not being presented as requirements, however, as they are in *Hurd*, but as factors for the court to consider. See *Iwakiri*, 682 P.2d at 578 (declining to adopt a rule that required strict compliance with procedural safeguards and requiring instead an inquiry into reliability under the totality of the circumstances). Thus, the absence of a recording might not be fatal to the witness's testimony, but would remain an option for therapists who expect their clients might end up in court. See *id.*

<sup>467</sup> See *supra* notes 64–78, 157–70 and accompanying text for discussion of therapeutic techniques.

<sup>468</sup> See *Hurd*, 432 A.2d at 95–96.

store long term conscious memories until the age of three or four.<sup>469</sup> Finally, considering as a factor the existence or absence of evidence corroborating the witness's testimony would be invaluable.<sup>470</sup> Evidence of a person's behavior as a child consistent with sexual abuse, information from other family members about events witnessed during that period, or medical records from that period would go a long way to distinguish a recovered memory that is probably true from one that is possibly, or probably, false.<sup>471</sup>

A case by case determination of reliability, based on the totality of the circumstances rather than a rigid adherence to procedural safeguards, represents a balance of some of the policy concerns implicated in either allowing all recovered memory testimony or allowing none. A victim of childhood sexual abuse still would have access to legal redress when the circumstances of his or her memory retrieval indicate that it is an independent memory rather than the product of suggestion. A defendant accused of sexual abuse, on the other hand, would be protected from civil or criminal liability based on a memory that is as likely to be false as it is to be true. Although this standard would involve increased pretrial litigation and might be time consuming for the courts, the concerns implicated on both sides of the debate are important enough to warrant such an additional procedure.

In reaching this determination, a court should consider factors including the qualifications and particular expertise of the therapist, the existence of a record or any evidence of what, if anything, the patient remembered before entering therapy, the existence of a record of the therapy sessions or of what techniques were employed, the type of memory loss involved, and the existence of evidence corroborating the proposed testimony. The determination should be made under the totality of the circumstances, rather than relying on a rigid adherence to procedural safeguards like those used by the *Hurd* court.<sup>472</sup> Finally, the task of the trial court would not be to evaluate the truth of the proposed testimony, but rather to determine whether the testimony is

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<sup>469</sup> See *TERR*, *supra* note 81, at 226; Wartick, *supra* note 102, at 62.

<sup>470</sup> See Ernsdorff & Loftus, *supra* note 38, at 166 (suggesting a requirement of corroborating evidence in order to toll the statute of limitations in recovered memory cases).

<sup>471</sup> See *id.* Some courts have required this as a precondition to the application of the delayed discovery rule in repressed memory cases, reasoning that the credibility of a recovered memory is an important factor in deciding whether to allow a decades-old case to come to court. See, e.g., *Meiers-Post v. Schafer*, 427 N.W.2d 606, 610 (Mich. App. 1988) (holding that corroborating evidence was a prerequisite to tolling the statute of limitations in cases of recovered memory).

<sup>472</sup> Compare *Hurd*, 432 A.2d at 91 with *State v. Iwakiri*, 682 P.2d 571, 575-76 (Idaho 1984).

based on an independent memory or whether it is in any significant way the product of suggestion.<sup>473</sup>

## V. CONCLUSION

The debate over recovered memory is often one of absolutes. From one perspective, the crisis we are facing involves the victimization of children and the need to remove the obstacles that might prevent them from seeking legal redress from their abusers. From another, the crisis involves potentially innocent adults being stigmatized, bankrupted, and sometimes criminally convicted on the basis of memories that may be no more than suggestion and innuendo. From the first perspective, if victims of sexual abuse are to have any real justice, their stories must be believed. From the second, unless all claims of recovered memory are met with a high degree of skepticism, the accused will have no justice. It is important for the courts to recognize that neither of the absolute positions has been generally accepted in the psychological community, and that the truth likely lies in between. The likelihood is that some recovered memories are true and some are false, and there is no way as of yet to tell how many fall within each camp. Thus, the only way for the courts to protect both the rights of sexual abuse victims and the rights of those who may be wrongly accused is to assume the role of gatekeeper by requiring a pretrial determination of the reliability of any recovered memory sought to be introduced at trial.

EMILY E. SMITH-LEE

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<sup>473</sup> See *McGlaufflin v. State*, 857 P.2d 366, 379 (Alaska Ct. App. 1993).